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ABSTRACT

This U.S. Congressional hearing, chaired by Representative Matthew G. Martinez (California), focuses on women in the work force. Issues, such as equal participation, pay, and advancement, along with sex discrimination and sexual harassment, are addressed. Testimony and written statements were presented by representatives from District of Columbia based institutions and organizations. Those representatives who gave speeches included: (1) Sarah E. Burns, Assistant Director, Georgetown University Law Center, Sex Discrimination Clinic; (2) Lorence Kessler, Attorney McGuiness & Williams; (3) Jill Emery, Acting Director, Women's Bureau, U.S. Department of Labor; (4) Nancy Krieter, Research Director, Women Employed Institute; (5) Marcia D. Greenberger, Managing Attorney, National Women's Law Center; (6) Cynthia Marano, Executive Director, Wider Opportunities for Women; and (7) Claudia Withers, Staff Attorney, Women's Legal Defense Fund. Written statements were also provided by: (1) Suzanne E. Meeker, National Women's Law Center (in conjunction with Marcia Greenberger); (2) Olympia J. Snowe, Congressional representative (Maine); and (3) Ruth Zacarias, Women's Legal Defense Fund (in conjunction with Claudia Withers). (JHP)

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WOMEN IN THE WORK FORCE: SUPREME COURT ISSUES

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, ON SEPTEMBER 30, 1986

Serial No. 99-135

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WOMEN IN THE WORK FORCE: SUPREME COURT ISSUES

TUESDAY, SEPTEMBER 30, 1986

House of Representatives,
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2257, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the full committee) presiding.

Present: Representatives Martinez, Hayes, Waldon, and Gunderson.

Staff present: Eric Jensen, staff director; Valerie White, legislative assistant; Mary Gardner, minority legislative associate; and Pam Kruse, minority staff assistant.

Mr. **Martinez**. I'm going to get this meeting started.

I'm sure that Charlie Hayes will be joining us in just a minute.

I'll go ahead and get my opening statement out of the way. And should Charlie join us and want to make an opening statement, we'll acquiese to him.

Today's hearing will focus on affirmative actions as it pertains to women in the workplace.

Affirmative action, as far as I'm concerned, is a crucial and critical development toward the securing of rights and opportunities for minorities and women.

Those rights and opportunities have always been ours, except for the narrowminded, tunnel vision attitudes that prevailed in the past; attitudes that stereotyped many people into certain roles and, in the woman's case, into roles which were once considered a traditional role for them, that of secretary and housewife and not much more.

Affirmative action is a means by which women can enter nontraditional employment, where they often excel. It is necessary for the elimination of past discrimination.

Our Employment Opportunities Subcommittee has oversight responsibility over EEOC, which is charged with enforcing antidiscrimination laws.

Since our country's human capital, men and women, are the single most important part of America's competitiveness, especially in this era of high technology, we all should place our highest emphasis on the national achievement of full employment, free from any kind of discrimination.

For many reasons, we can view with great pride the strides that women have made in our work force, and especially those contributions that women have made toward the national economic wellbeing of our country, while, at the same time, maintaining the welfare of their families.

But we all must recognize that the road to achievement for women has not been easy, nor has the struggle for equal participation, equal pay, and equal advancement been easy; nor is the struggle over.

There are still many barriers involved, involving women working in our society, including that pervasive force of archaic discrimination.

In addition, there's another problem that confronts women in particular, and that is of sexual harassment.

It remains a major problem which we as a society and we as a government must confront in order to rid the workplace of this practice.

It is my hope that as a result of the testimony given here today we can move toward eliminating all kinds of discrimination in the workplace, and learn to harness the creative skills and abilities of women and minorities free from harassment of any kind, and make this country as great as the Constitution meant it to be.

We have a broad range of experts here with us today, who will share their vast knowledge and experience, which will enable Congress and the people to take notice of the issues and implement policies that would create equal opportunity for minorities and women in any field of endeavor.

With that, I'd like to invite the member of our first panel to join us at the front table here.

Jill Emery, Acting Director of the Women's Bureau, Department of Labor, would you come forward.

Let me tell you that your testimony as it's presented in written form will be entered into the record in its entirety.

And if you could summarize for us, we would appreciate that.

STATEMENT OF JILL EMERY, ACTING DIRECTOR, WOMEN'S BUREAU, DEPARTMENT OF LABOR

Ms. **Emery**. Chairman Martinez——

Mr. **Martinez**. Would you first identify the two people that have joined you?

Ms. **Emery**. Yes.

To my right is Jayne Seidman, who is Chief of the Office of Experimental Programs and Technical Assistance, Women's Bureau, Department of Labor.

And on my left is Harriet Harper, who is the Chief of the Division of Economic Analysis.

Thank you for inviting me to join you this morning to examine the demographics of women in the workplace, including their progress in the work force and the trends we can expect in the future.

The dramatic increase in the participation of women in the labor force is one of the economic and social phenomena of the second half of this century.

The statistics tell a dramatic story. Today, over 51 million women are working or looking for work; 35 years ago, only 18 million participated in the labor force.

Today, most women work full time.

Women make up 44 percent of the labor force today. By the year 2000, it is projected that women will be nearly half of the labor force.

Sixty percent of the new entrants into the labor force between now and the year 2000 will be women.

At the same time, the family is changing. In fact, the traditional family represents only 5 percent of all families. That is father working, mother at home, two children.

The predominate family type is the married couple in which both the husband and wife work.

Women are delaying marriage, delaying having children, having fewer children. And when they have a child, almost one-half go right back into the labor force within the first year of the birth.

Sixty-three percent of all mothers with children under the age of 18 are working. And that represents 12 million women.

In 1950, only 2 million mothers were working.

Nearly 20 percent of American families are headed by single parents. That number has increased by 89 percent in the last 15 years, and is expected to increase.

Women now work in a wider variety of occupations and have progress to higher earning levels. Where a decade ago more than half of all women were concentrated in 20 occupations, today less than half of all women are concentrated in these same occupations.

Women have branched out into such fields as accounting, the legal profession, medicine, science, computer engineering and design, and banking, and finance.

On the other side of the coin, however, phenomenal growth in the labor force has resulted in fewer women available to provide many critical services that went unpaid in the past, such as child care, elder care, and voluntary community service.

Adjustments are critical in the home, at work, and in society in order to compensate for the shift in our Nation's division of labor.

The changing demographics of the work force and the changing demographics of the family are having a great impact on both the workplace and the family.

As Secretary Brock has said, one does not shed the role of parent or spouse at the factory gate or the office door.

Meeting the needs of work and family will become even more critical as we look forward to the year 2000, when there will be a projected shortage of skilled workers.

Flexibility in work schedules and benefit plans can assist employers in recruiting and retaining productive staff.

A number of firms in the United States are adopting some type of alternative work pattern, ranging from flexitime to job sharing and even to some forms of flexibility over the work year.

In fact, we have just published a new factsheet on alternative work patterns.

Another means for employers to provide for the needs of workers through flexible benefit packages, which recognize that all workers' needs are not alike.

One of the most sought after and needed benefits of working parents is employer supported child care.

A 1986 Conference Board report states that of 6 million employers in the Nation only 2,500 assist employees with child care. This number represents more than a 400-percent increase in 1982 when only 600 employers supported child care.

This is an area in which the Women's Bureau has actively pursued, over the past 5 years.

As you may be aware, one of Secretary Brock's major goals this year for the Department of Labor has been improving economic opportunities of American workers through emphasis on job opportunity.

In support of this goal, the Women's Bureau has taken a lead role in identifying activities to improve the employment opportunities for women.

Working with other components of the Department, the Bureau initiated a series of constituency meetings throughout the country, calling together experts from a variety of sectors to focus on the employment problems of displaced homemakers and women who maintain families, and to develop a strategy for addressing the most pressing needs.

The findings from these meetings indicate that society must begin to recognize women's special support needs in order to help prepare for employment now and in the future.

Child care, transportation, health care, basic education, and housing lead the list.

Through our own demonstration projects, we have found consistently that women participate more readily and more successfully in programs where support services are provided.

And an action plan is in the draft stages to guide future activities within the Department to serve the special needs of these groups.

Looking toward the future, the Women's Bureau has been particularly concerned about the impact of new technology on women's employment.

A major project has been to increase understanding of how office automation is affecting clerical jobs, the backbone of women's employment.

Two Women's Bureau publications, one defining the issues and the other defining what research needs to be done, are available for your committee.

We have also funded basic research at the National Academy of Sciences, which was presented last Friday at a major conference on the impact of high tech on how clerical jobs are designed. And we're happy to share this report entitled "Computer Chips and Paperclips" with you.

These programs are but a few examples of the Women's Bureau's work in addressing the needs of women in the work force.

We know that we cannot do the job alone. By working with other agencies within the Department of Labor and with public and private policymakers nationwide, we hope to have an impact on the issues currently facing the changing work force as well as those likely to emerge as we move toward the year 2000. Thank you.

[The prepared statement of Jill Houghton Emery follows:]

PREPARED STATEMENT OF JILL HOUGHTON EMERY, ACTING DIRECTOR, WOMEN'S BUREAU, DEPARTMENT OF LABOR

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify at this oversight hearing to examine the issue of "Women in the Workforce." We at the Women's Bureau are pleased to respond in this way to our Congressional mandate to investigate and report upon all matters pertaining to women and work, and "to formulate policies to promote the welfare of wage-earning women, improve their working conditions, and advance their opportunities for profitable employment."

In preparing for my appearance here, I have focused on the demographics of women in the workforce, including the progress that women have made in the workforce, what trends we can expect in the future, and the ways in which the Women's Bureau is addressing the needs and concerns of these women.

The dramatic increase in the participation of women in the labor force is one of the economic and social phenomena of the second half of this century.

- Today over half of all women are working or looking for work. Thirty-five years ago, only one in three was a participant in the labor force.
- The labor force today is becoming more equally composed of men and women. By the year 2000 it is projected that women will be almost half of the labor force.
- More than half of married women with husbands present are in the labor force. Husbands are no longer the sole support of families.
- Seven of every 10 mothers of school age children are in the labor force as well as over half of all mothers with preschoolers.
- Since 1970, the number of families maintained by a woman has risen 89 percent to 10.5 million in 1985.
- Women now work in a wider variety of occupations and have progressed to higher earnings levels. Where a decade ago, more than half of all women were concentrated in some 20 occupations, today that concentration has been reduced to less than half.
- Women now make up nearly two-fifths of executive, administrative and managerial workers and are the majority of workers in professional specialties.
- Women are about half of employees in the service producing sector of the economy.

- o Although most women work full time, about one-fifth of working women choose part-time schedules. Wives living with their husbands constitute the largest portion of women working part time 60 percent in 1985.

- o There has been a significant increase in the number of people holding temporary positions. This increase has resulted in rapid growth in the temporary employment industry (over 400 percent), with women's employment share increasing from half to more than three-fifths.

Moreover, women's phenomenal growth in the labor force has resulted in fewer women available to provide many services that went unpaid in the past, such as, child care, eldercare and voluntary community services of all kinds. Adjustments are needed in the home, at work and in society in general to provide for these and other necessary uncovered services.

As you might expect from the discussion of trends above, the need for adequate income to support the family or themselves has been a prime motivating force for women entering the workforce. However, despite significant gains in some occupations, women still face many barriers in access to higher-paying jobs.

As I mentioned earlier, the dramatic changes we are seeing in the workforce have increased the conflict workers, both male and female, face in managing the demands of work and family. Flexibility in developing work schedules and benefit plans can only assist employers in recruiting and retaining productive staff. Through contacts with organizations looking into work and family issues as well as with women themselves, we have heard of situations where the office communication system becomes overburdened at 3:30 p.m. when school is out and parents seek to monitor their children's afternoon activities. On the other hand, we have also heard of experiences of highly flexible and productive work places where workers can even work overtime because their children are adequately cared for.

Fortunately, a number of firms in the United States are experimenting with and more and more are adopting some type of alternative work pattern. These range from varied types of flexitime programs for the day or week, to job sharing, and even to some forms of flexibility over the work year. We have made available to you our new fact sheet on Alternative Work Patterns, describing various approaches and alternatives.

In addition to flexible schedules, another means for employers to provide for the needs of workers is through flexible benefit packages. We know that already a significant portion of the employee's income dollar now comes in the form of benefits. Flexible benefit plans recognize that not all workers' needs are alike and that what is essential for a worker at one time may not be a high priority at another time.

In a typical plan, employees receive core benefits and then, have a choice of a number of optional benefits such as levels of medical coverage, child care and eldercare, life insurance for workers and dependents, dental insurance and legal aid, within a given dollar limit.

These flexible benefit plans have proven to be quite popular with employees. Even though less than 20 percent of companies now offer flexible or cafeteria-type plans, a March 1985 Lou Harris survey found that 46 per cent of management personnel expected their companies to introduce flexible benefit plans within the next two years.

One of the most sought after benefits of working mothers and fathers is employer-supported child care. Yet, a 1986 Conference Board report states that of six million employers in the nation, only 2500 assist employees with child care. This number represents more than a 400 percent increase since 1982 when a mere 600 employers supported child care. Nevertheless, the need remains overwhelming.

The issue of employer supported child care is one that the Women's Bureau has actively pursued over the last five years. Among the activities we have undertaken are:

- o a nationwide project to inform employers of the child care needs of workers and to encourage them to establish some form of child care assistance;
- o a five-year cooperative program with the Rockefeller Foundation to serve the needs of disadvantaged minority single heads of households who are in job training; and
- o public information materials including publications and our film, The Business of Caring.

In looking to the future, the Women's Bureau has been particularly concerned about the impact of new technology on women's employment. A major project of ours has been to increase understanding of how office automation is affecting clerical jobs - the backbone of women's employment. Two Women's Bureau publications, one defining the issues, and the other defining what research needs to be done, are available for your Subcommittee. They are entitled Women and Office Automation: Issues for the Decade Ahead and Women, Clerical Work, and Office Automation: Issues for Research. We have also funded basic research at the National Academy of Sciences on this subject which has resulted in some important recommendations. Last Friday, September 26, the Academy presented the results of its study --results which, when absorbed, should have a strong impact on how technology is being implemented and on how clerical jobs are being designed. We are happy to share this report, Computer Chips and Paper Clips, with you.

During fiscal year 1986, one of Secretary Brock's major goals for the Department of Labor was "improving economic opportunities of American workers through emphasis on job opportunities..." In support of this goal, the Women's Bureau took a lead role in identifying activities the Department could undertake to improve the employment opportunities of two specific groups of women: women who maintain families and displaced homemakers.

Working with the Employment and Training Administration, the Bureau of Labor-Management Relations and Cooperative Programs, the Bureau of Labor Statistics and the Office of the Assistant Secretary for Policy, the Bureau initiated a series of constituency meetings throughout the 10 DOL regions and in Washington, D.C., calling together experts from outside the Department to focus on the employment problems of these two target groups.

The findings from these meetings indicate that the private and public sectors must begin to recognize women's special support needs in order to help prepare women for employment now and in the future. These support needs include: child care, family care, transportation, health care, basic education and housing. Through our own demonstration projects with these target populations, we have found consistently that women participate more readily and more succesfully in those programs where support services are provided. The Job Training Partnership Act (JTPA) currently allows for up to 15 percent of funds to be used for such services. Although on the average only 11 percent of the funds are being used for these services, some 53 percent of JTPA enrollees are women. A joint agency action plan is in the draft stages. It would guide future activities within the Department to serve the special needs of these groups.

The Bureau has also developed a number of model demonstration projects over the years. Many of them have been shared with Congress through previous hearings. Today, I would like to take a further moment to highlight three of our regional initiatives that have been successful.

In Region X, the Bureau has provided funding to three local community colleges to train nearly 100 women who maintain families. The program design includes employer contacts for job development, and incorporates basic educational skills as well as specific job skills. Support services such as child care and transportation are also provided during training and after placement. This particular program has been very successful in mobilizing cooperative resources to serve this disadvantaged population.

Research conducted by the Women's Bureau clearly pointed out that immigrant women in the United States face even more overwhelming barriers to employment. As a result of our research findings, the Bureau is currently involved in two projects specifically targeted to this population. In Brownsville, Texas, the Bureau and the Cameron County PIC are jointly funding a job training program for Hispanic immigrant women. This program provides basic literacy skills in Spanish and English, vocational education skills, and job training skills. The first class of 17 women graduated from this program in June 1986, and more are currently enrolled in the program. In Miami, Florida, the Bureau's focus has been on Haitian immigrant women. That program provides basic educational skills and trains the participants to be child care providers within the Haitian community. In the past year, the program has trained over 40 women with the added benefit that other immigrant women in the community can now participate in employment and training programs since their child care needs are being met.

Hispanic high school girls are the focus of another successful Bureau program, Project ELLA. This program is conducted in a Chicago area high school, and is designed to provide 25 to 50 Hispanic young women with career awareness, vocational counseling and information on nontraditional occupations, as well as information on available and appropriate employment and training services in their area.

These programs are but a few examples of the Women's Bureau work in addressing the needs of women in the workforce.

We know we cannot do the job alone. By working with other agencies in the Department of Labor and with public and private policy makers nationwide, we hope to have an impact on the issues currently facing the changing workforce as well as those likely to emerge as we move towards the year 2000.

Mr. **Martinez**. Thank you.

We've been joined by Charlie Hayes of Illinois, a member of the committee.

Charlie, we went ahead and I made my opening statement. I said I would defer to you when you arrived for an opening statement.

Do you have an opening statement?

Mr. **Hayes**. No, I don't.

Proceed. Proceed.

Mr. **Martinez**. Thank you.

Mr. **Hayes**. I want to hear the witnesses.

Mr. **Martinez**. Very good.

You know, while you were presenting your testimony, things come into my mind from certain things you say.

One of the things that seems evident is that at least some people in this administration and in the bureauacracy realize that women, are at a disadvantage if they're not provided some method or assistance for child care.

And since most women that are working today, unlike before, do have children that they have to care for——

Ms. **Emery**. Uh-huh.

Mr. **Martinez** [continuing]. And many of them are single——

Ms. **Emery**. Uh-huh.

Mr. **Martinez** [continuing]. Why is it that there are other people, and even in the Department of Labor, for example, don't sense the same need, that this need exists?

And let me tell you what I'm talking about.

When they were talking about closing down Job Corps centers and cutting back on Job Corps programs in San Jose, one of the particularly, I think, commendable things that the center there was doing was providing for mothers, who were recipients of training and program there, free child care.

This concept was expanded so that it allowed mothers already on jobs and not necessarily Job Corps recipients to bring their children there because child care centers are in great shortage.

They brought their children there and paid the full price. That helped defray the cost for those who were receiving training and who didn't pay because they really were not able yet.

And the program went from the stage of where you didn't pay while training, and as you went on the job, and you came to full salary you escalated the amount you paid for child care.

Well, one of the criticisms of that center by the Department of Labor was that program. And one of the restrictions in that program was to cut back their being able to offer child care.

Now, why? You're in the Department of Labor. Cimmeron is in the Department of Labor. Jones is in the Department of Labor.

Don't you people talk to each other to make them understand what the need is in this area?

Ms. **Emery**. Yes, we do work within the Department. And we do work closely with Roger Cimmeron.

And I cannot give you the answer to——

Mr. **Martinez**. Can you find out?

Ms. **Emery** [continuing]. To that question.

I certainly will.

But I can tell you that we do fund a project in San Jose. And we—it's a training project for women. And we are funding the child care component of that.

Mr. **Martinez**. My——

Ms. **Emery**. And it's been——

Mr. **Martinez** [continuing]. You can supply your answer to Eric Jensen, my staff director. He can supply you with the exact information that was given to us in regards to that particular program.

Maybe you can go back and ask the question why. Why would you want to cut back something that is, I think, a paramount need and is providing such a great service?

The WIN program was suggested by the Senate for termination.

We find legislation being created now that is modeled after several of the States' successful WIN programs. Because they've been very successful in taking welfare mothers and training them for jobs and providing day care center help and everything else that they need to become self-sufficient.

Certainly it's been proven that this program has returned to the Federal Government moneys and cost savings that more than pay for the program.

Why would anybody in their right mind want to terminate that.

Certainly, this is something that you in your responsibility in the job development for women in the Department of Labor should be interested in, to ensure that job training takes place, because it provides employment for these people. You should have input into telling these people over there, hey, this is a necessary program. We need it. Let's keep it.

Ms. **Emery**. Mr. Chairman, we are very concerned about child care, because we know that in order for women to obtain training, to stay in a training program, and then to go on and to be placed in a job, and to stay in that job that the child services are important.

And we at the Department of Labor, as I mentioned before, are funding the Rockefeller Foundation, which has three training programs across the United States in Providence, and Washington, and San Jose, and——

Mr. **Martinez**. That's good.

Ms. **Emery** [continuing]. Funding that child care component.

Beyond that, we have a video, the business of caring. We have several publications on child care. We offer technical assistance.

We have a day care center within the Department of Labor. That was one of the first in the Federal Government.

So, it is a need. And beyond that we're saying that the private sector is moving in that direction. And they do have the flexibility to determine what the needs of their employees are and, if it is child care, to offer all kinds of options to their employees.

Mr. **Martinez**. Does the Department of Labor support the continued existence of WIN?

Ms. **Emery**. That is not administered by the Department of Labor in the Women's Bureau.

Mr. **Martinez**. It has a——

Ms. **Emery**. And I certainly——

Mr. **Martinez** [continuing]. Direct bearing on efforts you're making and goals that you've set for the Department of Labor.

So, I would think that anything that assists you in achieving those goals, that you would have a right to have some say in or some input to.

And I would think, because I have great respect for Secretary Brock, from the statements he's made and things that he's done before, that it would not be asking too much to ask him to take a position on WIN and support it.

Ms. **Emery**. I certainly will be happy to take that back to the Secretary, Mr. Chairman.

Mr. **Martinez**. OK. Thank you.

Mr. **Waldon**. Mr. Hayes.

Mr. **Martinez**. Oh, excuse me for a minute.

We've been joined by—I guess the newest Member of Congress.

Mr. **Waldon**. No. Second.

Mr. **Martinez**. Second. Oh, you've been eliminated from the minors.

Mr. Waldon is from Chicago I believe.

Mr. **Waldon**. New York.

Mr. **Martinez**. New York.

Mr. **Hayes**. We've only got three.

Mr. **Martinez**. You're only three from Chicago?

Mr. **Waldon**. Well, I saw——

Mr. **Hayes**. Only three black ones.

Mr. **Martinez**. Oh. Very good.

Thank you for joining us, Mr. Waldon.

Do you have any questions for the witness?

Mr. **Waldon**. No.

Mr. **Martinez**. Mr. Hayes.

Mr. **Hayes**. I'm bothered maybe by one question, Ms. Emery—is it?

Ms. **Emery**. Yes.

Mr. **Hayes**. I guess, in terms of what I've always read and heard, when you look at the labor force, white male dominate. We agree on that, right?

Ms. **Emery**. Uh-huh.

Mr. **Hayes**. There's more of them than anyone.

And I guess white female is next in line. Then the black male. And the black female are the ones that's on the lower end of the labor force totem pole.

My question—and the source which we—the avenue—an avenue we've used most frequently to eliminate acts of discrimination because of color or sex has been the courts.

And with the most recent appointments to the Supreme Court of the Chief Justice, whose track record, I guess, justifies a label that he's been saddled with as being ultra-conservative, and the other appointment to the—to the Supreme Court, which is categorized, while he was approved unanimously in the Senate, as being a conservative, do you see the courts as an avenue, with the Supreme Court being the final court, to continue to resolve the differences that might come up in terms of discrimination because of sex or race? Or do you see the situation getting worse or better because of these appointments?

Ms. Emery. Well, of course, I, along with everyone else, hope that the Supreme Court is going—will continue to give fair and just decisions in terms of women and minorities.

Mr. Hayes. Which means the status quo could remain, right?

Ms. Emery. Well, the Supreme Court recently upheld the goals and timetables in affirmative action. I feel that that's helpful.

Mr. Hayes. Are you—I guess there's no conflict between the Department of Labor and the Attorney General's office, you know. He's opposed to affirmative action.

Ms. Emery. Mr. Hayes, you're throwing me in here.

But that is—I know we know what we're talking about. And that is a decision that should be made by the President. And I stand behind the President.

Mr. Hayes. OK.

Mr. Martinez. Thank you, Mr. Hayes.

One last question, Ms. Emery. I think you're in a very good position to answer this question.

How important do you feel affirmative action policies have been to women entering the work force and moving up in the work force? How important do you believe that affirmative action has been?

Ms. Emery. We think that certainly numerical goals and timetables have helped minorities and women. And the Labor Department has long supported this, this form of affirmative action as a good faith effort, including recruiting, and networking, and training, upward mobility.

It certainly provides employers with an opportunity to consider workers that they might otherwise have overlooked, and to look into a new pool of talent.

Mr. Martinez. Thank you.

I don't think that the attack on affirmative action is over yet. There will be constant test of it even though the Supreme Court has upheld that affirmative action is——

Ms. Emery. Uh-huh.

Mr. Martinez [continuing]. Proper and right to eliminate past discriminations and people aided don't have to be victim specific to have benefit from a remedy.

Ms. Emery. Uh-huh.

Mr. Martinez. Thank you very much for your testimony. We appreciate your being here with us today.

Ms. Emery. You're welcome. Thank you.

Mr. Martinez. Our next witnesses consist of a panel.

And let me introduce, first, Nancy Krieter, research director of Women Employed; Cynthia Marano, executive director of Wider Opportunities for Women; and Claudia Withers, staff attorney, Women's Legal Defense Fund.

And Marcia Greenberger, managing attorney, National Women's Law Center.

Let me again announce that all prepared statements will be entered into the record in their entirety. And we would appreciate the summarization and highlighting of that testimony.

Let us begin with Nancy Krieter. Would you care to start?

STATEMENTS OF NANCY KRIETER, RESEARCH DIRECTOR, WOMEN EMPLOYED; MARCIA GREENBERGER, MANAGING ATTORNEY, NATIONAL WOMEN'S LAW CENTER; CYNTHIA MARANO, EXECUTIVE DIRECTOR, WIDER OPPORTUNITIES FOR WOMEN; AND CLAUDIA WITHERS, STAFF ATTORNEY, WOMEN'S LEGAL DEFENSE FUND

STATEMENT OF NANCY KRIETER

Ms. KRIETER. We'd like to thank the subcommittee for inviting us to testify today concerning the effect of affirmative action on women's employment patterns.

Our perspective on this issue is based on our direct experience with working women, beginning in 1973, at approximately the time that demands were beginning to be made that antisex discrimination provisions then on the books should be enforced.

Since that time, women have made dramatic gains in entering occupations previously closed to them.

Affirmative action requirements and programs have been an essential component of this progress.

The concept of affirmative action, development of specific plans and performance measures to increase the representation of women and minorities in job categories in which they are underrepresented, was adopted under President Kennedy, in the 1960's, when it became clear that the Federal Government's policy of passive nondiscrimination was not sufficient to provide equal opportunity.

It has been upheld and strengthened by Presidents Johnson, Nixon, Ford, and Carter.

Unfortunately, during the Reagan administration affirmative action has been consistently under attack.

Women Employed research shows that the decades of the 1970's and early 1980's were marked by substantial improvements in the hiring, training, and promotion of women, which can be tied in large part to pressure created by the enforcement of equal opportunity laws and regulations by the Federal Government.

The banking industry was targeted for enforcement actions by the OFCCP during the Carter administration. Women's representation as bank officers and managers increased from 17.6 percent in 1970 to 44.4 percent in 1985.

One of the most dramatic improvements took place in the field of sales after the OFCCP targeted the insurance industry. Overall, statistics for the sales agent category show that the percentage of sales women increased from a mere 7.2 percent in 1970 to 41 percent in 1985.

Women Employed members, who, today, work at all employment levels, are the individuals behind those statistics.

Our members in the banking industry, who, although they were college graduates, were employed in jobs with strictly clerical career paths 13 years ago, today they hold positions as vice presidents, investment managers, trust and banking officers.

Our members in the insurance industry, who were stuck in dead-end job as raters, customer service representatives, claims adjusters, and secretaries, today hold positions as senior underwriters, claims managers, and actuaries.

The progress has been significant, but much remains to be done. Various groups within the Reagan administration are strongly opposed to affirmative action. They have waged their fight in terms that have distorted the meaning of affirmative action and caused extensive confusion about the extent of discrimination in the public mind.

Affirmative action requirements for Federal contractors consist essentially of three elements. The first is a survey of the work force by the contractor to discover whether there is any underutilization of women and minorities.

The second consists of a commitment by the contractor to correct the underutilization, including goals and timetables by which the correction can be reasonably accomplished.

And the third element is a monitoring system to ensure that the program is fairly and equitably accomplishing its objectives.

This is a program put in place to provide equal employment opportunity for qualified workers. It is not a program which forces employers to hire, promote, or train unqualified workers in order to meet rigid hiring quotas.

A goal is an estimate of the number of qualified persons who are available and could be reasonably expected to be employed absent discrimination.

The estimate is made by the employer and subject to review by the Government. And its test is that it be reasonable, attainable, and nondiscriminatory.

In fact, the use of goals and timetables for the purpose of remedying underutilization of women and minorities in a work force is no different from any other measurement tool used by a business, whether it be production goals, quality standards, or strategic planning.

Further, an employer's compliance with affirmative action requirements is not determined solely on the basis of whether it has achieved its goal. The test is whether or not a good faith effort has been demonstrated.

The problem is that extreme opponents of affirmative action in the administration are determined to get rid of these enforcement programs and outlaw affirmative action remedies.

Although many business leaders have emphatically stated their commitment to affirmative action, in the face of these attacks those less committed use the administration's posture as an excuse to abandon affirmative action.

It is time for attacks from the Justice Department, the EEOC, and other members of the administration to stop.

Recent Supreme Court decisions have derailed the momentum against affirmative action. However, the fight is not over.

The success of affirmative action is linked to other enforcement areas under attack—Namely, enforcement programs of the EEOC and OFCCP. Performance by both agencies has declined to dismally low levels after substantial progress was made during the Carter administration.

And I will submit statistics on their performance with my written testimony.

And we need reinstatement of full title 9 protection so that women have the equal educational opportunities necessary to continue to be fully qualified in the labor force.

We urge the members of this subcommittee to do everything possible to prevent the destruction of affirmative action.

Thank you.

Mr. MARTINEZ. Thank you, Ms. Krieter.

[The prepared statement of Nancy Krieter follows:]

Prepared Statement of Nancy Kreiter, Research Director, Women Employed Institute

My name is Nancy Kreiter; I am the Research Director of the Women Employed Institute, the research and education division of Women Employed, a membership association of working women. Over the past thirteen years, our organization has closely monitored the performance of equal opportunity enforcement agencies. This work includes extensive statistical monitoring of EEOC and OFCCP performance, policy analysis, and development of detailed proposals for improving enforcement efforts. Women Employed's Job Problems Counseling Service provides information on case handling, timeliness, and overall enforcement efforts in the Chicago area. In addition, through our career development and job hunting assistance programs, we have extensive experience with the barriers women continue to face in advancing in the workforce.

We would like to thank the subcommittee for inviting us to testify today concerning the effect of affirmative action on women's employment patterns. Our perspective on this issue is based on our direct experience with working women beginning in 1973, at approximately the time that demands were beginning to be made that anti-sex discrimination provisions then on the books should be enforced. Since that time, because of vigorous action by women's organizations, periods of strengthened enforcement by government, and affirmative action by employers, women have made dramatic gains in entering occupations previously closed to them.

Affirmative action requirements and programs have been an essential component of this progress. The concept of affirmative action--the development of specific plans and performance measures to increase the representation of women and minorities in job categories in which they are underrepresented--was adopted in the 1960's when it became clear that the federal government's policy of "passive nondiscrimination" was not sufficient to provide equal opportunity. Since that time, affirmative action has evolved into a fair and equitable policy widely applied in private industry, with bipartisan political support, affirmed in principle and practice by the Supreme Court. The affirmative action clause was written into Executive Order 11246, issued by President Johnson and retained by Presidents Nixon, Ford, and Carter. Unfortunately, during President Reagan's tenure, affirmative action has been consistently under attack.

There is ample documentation to support our contention that affirmative action programs have been responsible for significantly increasing the employment opportunities of women in jobs from which they have been excluded historically. The correlation betweeen affirmative action and gains for women and minorities has been documented in three studies completed over the past several years: an internal OFCCP study, a study by Jonathan Leonard under contract with the U.S. Department of Labor, and one by the Potomac Institute. The Women Employed Institute's own research shows that the decade of the 1970's and early 1980's were marked by substantial improvements in the hiring, training, and promotion of women--achievements which can be tied, in large part, to pressure created by the enforcement of equal opportunity laws and regulations by the federal government. In fact, some of the most impressive increases in women's participation were achieved in specific industries and occupations which were targeted by organizations and government enforcement agencies. For example, the suit filed by the Women's Equity Action League

(WEAL) in 1974 forced the OFCCP to focus on higher education institutions with the following results: In 1970, 28.3 percent of all university and college teachers were women; by 1985 women's participation had reached 35.2 percent. The banking industry was targeted for enforcement actions by the OFCCP during the Carter administration. Women's representation as bank officers and managers increased from 17.6 percent in 1970 to 44.4 percent in 1985. One of the most dramatic improvements took place in the field of sales after the OFCCP targeted the insurance industry. Overall statistics for the sales agent category show that the percentage of saleswomen increased from a mere 7.2 percent in 1970 to 41 percent in 1985.

Enforcement efforts by the OFCCP were successful because the numerical goals and timetables included in affirmative action plans made it possible for the agency to statistically measure a contractor's good faith effort to correct underutilization of women and minorities in its workforce. The ability to quantitatively measure the success or failure of a contractor's efforts and require corrective measures is essential if the contract compliance program is to function as an effective weapon against job discrimination.

Women Employed's members, who today work at all employment levels, are the individuals behind those statistics. In 1973, many of our members were college-educated women whose treatment in the workplace was dramatically different from men's. At that time, there was no interest on the part of employers in correcting these inequities. Without affirmative action and other enforcement programs, these inequities would have continued. Our members in the banking industry who, although they were college graduates, were employed in jobs with strictly clerical career paths thirteen years ago; today they hold positions as vice presidents, investment managers, trust and banking officers. Our members in the insurance industry who were stuck in dead-end jobs as raters, customer service representatives, claims adjusters and secretaries today hold positions as senior underwriters, claims managers and actuaries.

The progress has been significant, but as we have indicated to this subcommittee at many previous hearings, much remains to be done. Affirmative action enforcement by the government must be strengthened and corporate affirmative action programs must be maintained and expanded. Unfortunately, various groups within the Reagan administration are strongly opposed to affirmative action and other equal employment opportunity measures. They have waged their fight in terms that have distorted the meaning of affirmative action and caused extensive confusion about the extent of discrimination in the public mind. We want to clarify, for the record, the actual elements of affirmative action policy, specifically in terms of the contract compliance program as required by Executive Order 11246, as amended.

Affirmative action requirements for federal contractors consist essentially of three elements. The first element is a survey of the workforce by the contractor to discover whether there is any underutilization of women and minorities. The second consists of a commitment by the contractor to correct the underutilization, including goals and timetables by which the correction can be reasonably accomplished. The third element is a monitoring system to ensure that the program is fairly and equitably accomplishing its objectives.

The workforce survey is intended to focus specifically on those job categories and career areas from which women and minorities have traditionally been excluded, such as professional, managerial, technical, skilled trades. The size of the goals are arrived at through estimates of anticipated vacancies, and the availability of persons with the requisite skills and abilities. These goals can be reached through good faith efforts of recruitment, outreach, training and other positive personnel practices. Opponents of affirmative action have attacked these requirements, saying that they force contractors to hire less qualified applicants. In fact, this is a program put in place to provide equal employment opportunity for qualified workers. It is not a program which forces employers to hire, promote, or train unqualified workers in order to meet rigid hiring quotas. Affirmative action goals under Executive Order 11246 create no set-asides or otherwise reserve a specific number of positions for any particular group. A goal is an estimate of the number of qualified persons who are available and could be reasonably expected to be employed absent discrimination. The estimate is made by the employer and is subject to review by the OFCCP, and its test is that it be reasonable, attainable and nondiscriminatory. Progress toward the goal is a measure of the employer's success in eliminating the discriminatory exclusion of minorities and women. In fact, the use of goals and timetables for the purpose of remedying underutilization of women and minorities in a workforce is no different from any other measurement tool used by a business, whether it be production goals, quality standards, or strategic planning. Further, an employer's compliance with affirmative action requirements is not determined solely on the basis of whether it has achieved its goal. The test is whether or not a good faith effort has been demonstrated. No contractor has ever been subject to sanctions because a goal was not reached. Most importantly, the contract compliance program never requires an employer to hire or promote a less qualified minority or woman over a more qualified white male.

Because the goals and timetables required under Executive Order 11246 have been instrumental in helping to overcome economic injustice, and because they do not impinge on the legitimate job rights of other members of the workforce, it is essential that these affirmative action requirements be continued until the remaining vestiges of employment discrimination have been eliminated.

During the Reagan administration, this subcommittee and other Congressional committees have heard ample testimony on the need for affirmative action. The problem is that extreme opponents of affirmative action in the administration are determined to get rid of these enforcement programs and outlaw affirmative action remedies. The Justice Department has filed costly and frivolous lawsuits, attempting to force municipalities to change widely accepted practices and agreements which have proven beneficial to them and their employees; the Justice Department and the Equal Employment Opportunity Commission have abandoned affirmative action as a remedial tool in ending proven discrimination and has forbidden affirmative action remedies in consent decrees. It is a credit to the municipalities and employers who have resisted these efforts in order to preserve strong affirmative action policies.

Recent Supreme Court decisions have derailed the momentum against affirmative action. However, the fight is not over. By distorting the terms of the debate on the validity and efficacy of affirmative action, members of the administration are creating confusion and hostility toward the progress that has been achieved by women and minorities. Although many business leaders have emphatically stated their commitment to affirmative action in the face of these attacks, those less committed will use the administration's posture as an excuse to abandon affirmative action.

We firmly believe that affirmative action is still necessary to continue to make headway against discrimination that makes women and minorities second-class citizens in the job market. Despite this administration's misrepresentations concerning equal opportunity enforcement programs, there continues to be strong public support for ending discrimination through such programs. It has been documented that affirmative action is effective in opening up opportunities to women and minorities. Employers who embraced this concept have benefitted because they have hired from the largest pool of talent available. It is time for the attacks from the the Justice Department and other members of the administration to stop.

The succcess of affirmative action is linked to other enforcement areas under attack, namely:

- --enforcement programs at the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance Programs. Performance by both agencies has declined to dismally low levels after substantial progress was made during the Carter administration (statistics attached);
- --reinstatement of full Title IX protections so that women have the equal educational opportunities necessary to continue to be fully qualified in the labor force;
- --preservation of firmly established policies and programs in both the federal and private sectors designed to bring women and minorities into full participation.

We urge the members of this subcommittee to do everything possible to prevent the destruction of affirmative action. We will continue to work with all those who are committed to true equal opportunity to ensure that affirmative action is preserved.

SUMMARY OF OFCCP ENFORCEMENT ACTIVITY

FY Comparisons: FY 1980-FY 1986

	FY'80	FY'81	FY'82	FY'83	FY'84	FY'85	*FY'86
npliance Reviews npleted	2,627	3,135	3,081	4,309	5,025	5,204	3,853
fected Class ses Completed	391	346	213	N.A.	N.A.	N.A.	N.A.
nciliation reements	743	1,038	696	816	1,164	1,139	1,012
min .rative mplaints Filed	53	15	5	18	25	12	7
ck Pay Awarded	$9,253,861	$5,095,497	$2,132,000	$3,559,000	$2,656,384	$1,884,238	$1,277,550
Persons	4,336	4,754	1,133	1,748	496	299	400

OFCCP DEBARMENTS

Total	1965-1976	Carter Administration	Reagan Administration
28	13	13	2

First three quarters
ource: Women Employed Institute from OFCCP Quarterly Review and Analysis Reports

WOMEN EMPLOYED INSTITUTE
5 SOUTH WABASH • SUITE 415 • CHICAGO, ILLINOIS 60603 • (312) 782-3902

EEOC

ENFORCEMENT STATISTICS

	FY'80	FY'81	FY'82	FY'83	FY'84	FY'85	FY'86*
Total Closures	49,225	71,690	67,052	74,441	55,034	63,567	27,990
Settlement Rate	32.1%	28.9%	29.4%	26.2%	20.8%	14.4%	13.6%
No-Cause Rate	28.5%	29.4%	35.0%	41.1%	46.7%	56.2%	56.6%
Time Lapse (months)	3-6.5	5-8	5.4-9.4	4.3-7.2	5.9-6.8	6.4-6.9	6.7
Backlog	37,675	20,238	33,417	31,538	39,893	46,661	51,004

LITIGATION STATISTICS

	FY'80	FY'81	FY'82	FY'83	FY'84	FY'85	FY'86*
Cases Recommended to General Counsel	393	469	401	338	276	708	292
Cases Approved by Commission	322	364	112	192	216	277	174
Cases Filed in Court**	326	368	164	136	226	286	170

* First Half
** Including subpoena enforcement actions
Source: Women Employed Institute from EEOC District Office Reports; EEOC Legal Services; EEOC Office of Program Operations Annual Report: Fiscal Year 1985

Mr. **Martinez.** Marcia.

STATEMENT OF MARCIA GREENBERGER

Ms. **Greenberger.** Thank you, Congressman Martinez, and Congressmen Hayes and Waldon.

I'm delighted to be here today. And with me is Suzanne Meeker, with the National Women's Law Center, and since 1972 we have been working to secure equal opportunity for women in the work force through the enforcement of title 7, the Equal Pay Act, the Executive order. And we have to add as well title 9, which prohibits discrimination in education, as Ms. Krieter pointed out, and also employment opportunities in education.

In our written testimony, we go into some detail on the need for affirmative action and the significance of the recent Supreme Court decisions last term on affirmative action, as well as the administration's attack on affirmative action, both in the courts and elsewhere.

And we appreciate your willingness to submit our written testimony for the record.

I do want to summarize, however, that although, as Ms. Krieter described, affirmative action has proven to be critical in securing affirmative action—equal opportunity for women, the administration continues to raise questions about its validity, and has remained the most visible opponent of affirmative action.

They have continued their attacks in the courts. They were successful in the *Grove City* case in undermining 1009 and other civil rights laws. And they have not stopped in their efforts to try to undermine the employment discrimination laws as well.

Fortunately, for women and members of other disadvantaged groups, so far the Supreme Court has not agreed with the administration that affirmative action is itself prohibited discrimination. And it's rejected the premise of the basic legal arguments that the administration has advanced.

The three basic cases decided last term, *Wygant* v. *Jackson Board of Education, Local 28* v. *Equal Opportunity Commission, Local 93* v. *City of Cleveland*, are cases where the majority of the Supreme Court reaffirmed its support for affirmative action remedies.

In the Wygant case, it was decided under the Constitution and the 14th amendment. In that case, although the Supreme Court struck down the particular affirmative action measure at issue, which was a layoff provision, as too harsh of a remedy, the majority of Justices expressed their support for affirmative action by public employers. And also said, expressly, that affirmative action need not be limited to victims of prior discrimination, which was one of the major arguments of the administration.

The *Wygant* case was followed by *Local 28* and *Local 93*, and they confirmed the Court's approval of affirmative action.

Local 28 dealt with title 7, as did *Local 93*. And the Court upheld the validity, first, of Court-ordered hiring decrees and, second, consent decrees in order to overcome effects of race discrimination in the work force.

While the decrees in *Local 28* and *93* cases were different—one came through the Court order and another through a voluntary consent decree—they expressly rejected the administration's arguments again that the only beneficiaries of court decrees could be actual identifiable victims of discrimination.

And I do want to add a fourth case here, the *Bazemore* case, which was decided also last term by the Supreme Court, which upheld the use of statistics and the importance of statistical evidence, which went along hand in glove with the importance of classwide relief.

Well, we all know that there are a number of issues that still remain that the Supreme Court has not yet addressed and, in fact, has taken some very important cases dealing with affirmative action this term.

And we see, again, in the context of these cases, that the administration is continuing its fight to dismantle affirmative action efforts in this country.

It has not conceded defeat and, in fact, has tried to minimize the importance of last term's decisions and undercut them in its arguments this term.

We were very disappointed when Clarence Thomas stated that he now sees a role for affirmative action in remedies that the EEOC will try to secure, but only in rare, egregious cases.

We don't know what he means by rare, egregious cases. And certainly the pattern of affirmative action and its importance has been widespread and it is not rare at all.

Similarly, the attacks on the Executive order have been delayed, but they certainly have not been given up by the administration. And we understand, from press reports, that the administration is now waiting to see what happens with this term's cases. But there are still efforts to eviscerate the Executive order.

And we've heard Assistant Attorney General Brad Reynolds say that his attacks on consent decrees entered into by Government agencies around the country may be lessened, and he may now review some of those challenges. But he has not said that he plans to drop all of those challenges by any means.

And I just want to take my final minute or so to review some of the arguments that the Government has made in its briefs that it's filed in the Supreme Court cases this term because they are so egregious and so devastating, in my view, that I think they need a very widespread public airing.

One of the cases is the *Johnson* v. *Transportation Agency* case. And it's the first one that the Supreme Court has taken that deals with sex discrimination and affirmative action. And it deals with a consent decree that the Santa Clara County Department of Transportation entered in to to bring more women into nontraditional jobs. And I think that case is going to be discussed by others on the panel, so I won't go into the details.

Suffice it to say that I want to make two points.

No. 1. The area of transportation and job opportunities for women has been one of the really crying, I think, shameful stories in this country, where women have been excluded from jobs not only by private contractors on road construction and the like, but also State departments of transportation themselves.

And we have had an enormous battle with the Department of Transportation to try to get them to investiqate complaints filed by groups around the country, and including the Southeast Women's Employment Coalition.

They have begun to investigate. They have found dramatic evidence of discrimination in State departments of transportation in virtually every State in this country, and yet have done virtually nothing about it, and have not yet moved on to look at what any private road contractors are doing, despite the millions of dollars of Federal aid pouring into road construction in this country.

So, to me, it's quite appropriate that one of the first Supreme Court cases on affirmative action for women should come up in the area of transportation.

In that case, there was a job category called skilled craft workers that had 238 positions, not 1 filled by a woman.

Now, this was the sorry state of affairs when the Santa Clara department agreed to enter into an affirmative action policy and program.

The Justice Department, in the brief it filed in this case, has said, the fact that there were no women in this job category was not sufficient justification for affirmative action.

One might ask what in the world would be sufficient justification if the absence of any women in a category that large wasn't enough evidence of discrimination? And, of course, the answer is nothing, as far as the Justice Department is concerned, I'm quite convinced.

Second, the Justice Department also advances quite an intriguing argument in this case about what the standard is that the Court should use when it looks at affirmative action plans that deal with women.

There has been quite an effort in this country to get constitutional protection for women. The equal rights amendment, obviously, has been a major agenda item that unfortunately has not yet been realized.

We have some modest protection in the 14th amendment now, where we have what is called a middle-tiered scrutiny. The Court will look at sex discrimination challenges with a middle ground of scrutiny.

What the Government has argued in this case is, where there's affirmative action designed to help women, that affirmative action should be looked at with strict scrutiny because of its potential harm for men.

So, where men are involved, we need to have the toughest standards to be sure that men aren't discriminated against.

But where women are involved and where women are discriminated against, there shouldn't be that strict standard.

It is quite an extraordinary position advanced in this case.

Well, one wonders where we are headed, certainly.

We have a new appointment to the Supreme Court and a new Chief Justice.

So far, the Supreme Court has been the one bastion of hope we have had against the administration's assaults in the court. I certainly hope that that continues to be the case. But I do think that we are in a very fragile position, at the moment, with respect to our rights. And vigilance by Congress and your subcommittee are sorely needed.

Thank you.

Mr. **Martinez**. Thank you, Ms. Greenberger.

[The prepared statements of Marcia D. Greenberger and Suzanne E. Meeker follow:]

PREPARED STATEMENTS OF MARCIA D. GREENBERGER AND SUZANNE E. MEEKER, NATIONAL WOMEN'S LAW CENTER

Chairman Martinez and members of the Subcommittee on Employment Opportunities:

I am Marcia Greenberger, a managing attorney of the National Women's Law Center. With me is Suzanne Meeker, a staff attorney at the Center. We appreciate your invitation to testify on the subject of Women in the Workforce. Since 1972, the Center has worked to secure equal opportunity in the workplace through full enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17; other civil rights statutes; and Executive Order 11246, 3 C.F.R. 339 (1964-65 Comp.), as amended by Exec. Order No. 11375, 3 C.F.R. 320 (1967), reprinted in 42 U.S.C. § 2000e; and through the implementation of effective remedies for long-standing employment discrimination against women and minorities.

Our testimony today will address the need for affirmative action to improve women's employment opportunities and then turn to the significance of the Supreme Court's decisions last Term in several affirmative action cases,1/ especially in light of the role of the Reagan Administration with respect to equal employment opportunity for women. Because the Center's work has been primarily in the area of sex discrimination, our testimony will focus on the status of women. Many of the problems women face, however, are shared with those facing other forms of discrimination, and, of course, women are discriminated against not only on the basis of their sex, but also on the basis of their race, national origin, religion, disability, and age.

Almost a quarter of a century has passed since the first national efforts were taken to end sex discrimination in employment. The Equal Pay Act, 29 U.S.C. § 206(d), was passed in 1963, and Title VII followed the next year. During the years that these statutes have been in effect, the labor force participation rate of women as reported by the U.S. Department of Labor has risen from about 38 percent in 1963 and 1964 to about 55 percent in 1985.

Despite these developments, however, women's overall economic well-being has not improved as it should have: continuing inequities between women and men have been shown to result in part from ongoing discrimination against women by their employers with respect to both pay and placement. E.g., B. Reskin & H. Hartmann, eds., Women's Work, Men's Work 44-56 (1986) (discussing studies); D. Treiman & H. Hartmann, eds., Women, Work, and Wages 93 (1981). Studies have also shown that vigorous enforcement of antidiscrimination laws is effective in improving women's employment opportunities, but that enforcement efforts have too often been inadequate, especially since 1981. See

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1/ Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842 (1986); Local 28 v. Equal Employment Opportunity Comm'n, 106 S.Ct. 3019 (1986); Local No. 93 v. City of Cleveland, 106 S.Ct. 3063 (1986).

statistical disparities as evidence of discrimination, which is often essential to support classwide relief, and has chosen to rely on individual, anecdotal evidence alone.

Fortunately for women and members of other disadvantaged groups, however, the Supreme Court has not agreed with the Administration that affirmative action is itself prohibited discrimination, and has rejected many of the legal arguments on which the Administration's position is based. This past Term the Supreme Court decided three affirmative action cases: Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842 (1986); Local 28 v. Equal Employment Opportunity Comm'n, 106 S.Ct. 3019 (1986); and Local No. 93 v. City of Cleveland, 106 S.Ct. 3063 (1986). In these decisions a majority of the Court reaffirmed its support for affirmative action remedies to overcome the effects of past race discrimination and, by implication, past sex discrimination.

The Wygant case -- the first case decided -- involved the constitutionality under the Fourteenth Amendment equal protection clause of a provision in a collective bargaining agreement that required a school board to lay off teachers in seniority order, except when the result would be to lay off a higher percentage of minority teachers than was currently employed in the school system. When layoffs occurred, some minority teachers were retained who were junior to some white teachers who were laid off, and the white teachers sued.

Although the Supreme Court struck down the layoff program, there was no majority opinion. In fact, a majority of the Justices expressed support for the concept of affirmative action by a public employer, which need not be limited to identified victims of prior discrimination as the Administration has contended. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, suggested that affirmative action might be appropriate on the basis of a statistical disparity in the workforce of an employer compared to the relevant labor market; such a disparity could provide sufficient evidence of prior discrimination to warrant remedial action. 106 S.Ct. at 1847-48. Justice Powell found the layoff program at issue too "intrusive," but endorsed alternative means "such as the adoption of hiring goals." Id. at 1852. Justice O'Connor, in a separate opinion, similarly stated that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program" and that an employer need not admit past discrimination. Id. at 1853, 1855. This is extremely significant if voluntary remedies to overcome the effects of past employment discrimination are to be encouraged. Justice Marshall, joined by Justices Brennan and Blackmun, thought that the case should be remanded to the District Court for development of the factual record as to the basis for the layoff program, but concluded that, if the constitutional question were to be

Women's Work, Men's Work, supra, at 84-96. Thus, one study found that women's average earnings have remained about 60 percent of men's "[f]or as long as data have been available for the United States." Id. at 1. Moreover, nearly half of all women hold traditionally female, sex-segregated jobs (jobs whose incumbents are at least 80 percent female), id. at 20-22, a pattern that has also been "remarkably stable * * * since at least 1900," id. at 1.

To improve women's economic well-being, it is necessary not only to attack wage discrimination, but also to remove discriminatory barriers to the employment of women in higher-paid, traditionally male fields. The removal of those barriers is the role of affirmative action, a term that may encompass any positive steps taken by an employer to change the outcome of generations of discrimination and exclusion. The importance of affirmative action to redress the effects of past discrimination has been widely recognized both by private entities and governmental agencies, at least until the current Administration took office. A study published just this year under the auspices of the National Research Council, Women's Work, Men's Work, supra, reviewed the effectiveness of various strategies to increase women's job opportunities in non-traditional jobs, and concluded that "[w]omen's job options did not improve 'naturally.' Committed top managers had to pursue this goal just as they would any other organizational goal * * *. According to a Conference Board survey of 265 large corporations, the most important factors for increasing women's opportunities [included] implementation and dissemination of an equal employment policy that included goals and timetables * * *." Id. at 97.

Although affirmative action has been proven to be critical in securing equal opportunity for women, questions continue to be raised about its validity. The most visible opponents of affirmative action in recent years have been found in the Reagan Administration, which has mounted a wide-ranging, coordinated attack on the affirmative techniques developed over the years to combat systemic discrimination. The Justice Department has brought legal challenges to the broad concepts of affirmative action and classwide relief for discriminatory practices, and has attacked long-standing consent decrees including such relief. The EEOC has declined, as a matter of policy, to seek goals and timetables as a remedy in cases that it has brought, joining the Justice Department in seeking relief only for "identified" victims of employer discrimination. Moreover, the Administration has striven to decimate Executive Order 11246 by not only eliminating any requirement that federal contractors utilize goals and timetables to remedy employment discrimination but also, it appears, precluding federal contractors from voluntarily utilizing such remedies. See, e.g., The Washington Post, Sept. 11, 1985, at A1, col. 2. Finally, as an integral part of this attack, the Administration has largely rejected the use of decided, the school board plan plainly was lawful. See id. at 1862.

The Wygant decision thus suggested that the Reagan Administration's almost unqualified opposition to affirmative action is not supported by the Supreme Court and has no basis in law. The Court's subsequent decisions in Local 28 and Local No. 93 confirmed that point. Both of these cases arose under Title VII, rather than the Constitution. Local 28 involved the validity of a court-ordered hiring decree entered more than 20 years after the union's hiring practices had first been found to be racially discriminatory, but had not been remedied. Local No. 93, by contrast, involved the validity of a voluntary consent decree between the City of Cleveland and its minority firefighters that embodied numerical goals for race-conscious promotions. In that case, which followed a series of discrimination lawsuits, no race discrimination had actually been found.

While the origins of the decrees in the Local 28 and Local No. 93 cases were different, both involved an issue that the Administration has repeatedly raised with respect to the validity of affirmative action under Title VII, i.e., whether § 706(g) of the statute expressly precludes affirmative action remedies by barring courts from ordering relief that might benefit anyone other than actual, identified victims of discrimination. In both cases, a majority of the Court rejected that contention. See Local 28, 106 S.Ct. at 3034 (plurality op.); id. at 3054 (Powell, J., concurring); Local No. 93, 106 S.Ct. at 3080. Moreover, in Local No. 93, the 6-3 majority, in an opinion written by Justice Brennan, stressed that "Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII. * * * It is equally clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." 106 S.Ct. at 3072 (citing United Steelworkers of America v. Weber, 443 U.S. 193 (1979)). These Title VII rulings are equally applicable to sex discrimination and sex-conscious remedies, since Title VII prohibits race- and sex-based discrimination to the same extent. E.g., Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978).

Finally, in Bazemore v. Friday, 106 S.Ct. 3000 (1986), also a Title VII case, the Court reaffirmed as it had in Wygant the importance of classwide, statistical evidence in establishing probable discrimination. This ruling directly corresponds to the importance of classwide relief for discrimination through affirmative action remedies.

Thus, although a number of issues remain with respect to the precise constitutional and statutory requirements for valid affirmative action plans -- some of which may be addressed this Term in several cases the Court already has taken -- such plans continue to be a recognized, lawful, and necessary remedy to ensure equal employment opportunity.

The Administration, however, has not conceded defeat in its attack on affirmative action. Clarence Thomas, for example, recently reconfirmed as EEOC Chairman, has stated that that agency will resume the use of remedies incorporating goals and timetables as a result of the Court's decisions, but only in what are purportedly rare, "egregious" cases of discrimination. "EEOC Unable to Remedy The Failure Of Education, Thomas Says," Equal Opportunity in Higher Education, Sept. 25, 1986, at 1, 2. Similarly, the Administration has only delayed -- but expressly not abandoned -- its plans to eviscerate Executive Order 11246 by eliminating affirmative action requirements applicable to many federal contractors. It has been reported that the final decision on the Executive Order instead will await Supreme Court decisions in two pending cases, Johnson v. Transportation Agency, No. 85-1129, and United States v. Paradise, No. 85-999, both of which will be argued this fall. "Trends & Forecasts," 24 Fair Employment Report 135 (1986). For its part, the Justice Department apparently plans to continue to pursue at least some of its challenges to consent decrees that incorporate affirmative remedies. Indeed, the Justice Department's continued opposition to affirmative action of any kind emerges clearly from the briefs filed by the Solicitor General in the Johnson and Paradise cases.

Johnson is especially important for women because it the first case involving sex-conscious affirmative action to reach the Supreme Court. The Transportation Agency of Santa Clara County, California, voluntarily implemented an affirmative action plan to address the serious underrepresentation of women, minorities, and disabled persons in its workforce. Pursuant to that plan, a woman was promoted to Road Dispatcher and a man was not. Both were qualified and eligible for the job under the County's merit selection rules, but the man sued, claiming that he was more qualified, that the affirmative action plan was invalid under Title VII, and that he would have received the promotion but for his sex.

The Solicitor General has filed an amicus brief in Johnson, asking the Court to find the agency's voluntary affirmative action plan invalid. Among the arguments advanced is the following: The Administration says, first, that even though this is a Title VII case and no constitutional claim was raised below, the plan at issue must be measured against the equal protection clause of the Fourteenth Amendment because the agency is a public employer. The Administration then goes on to assert that the appropriate standard of constitutional review is so-called "strict scrutiny" -- a very exacting standard which the Court has previously held applies to race- but not to sex-based classifications. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190 (1976). Unfortunately *for women*, the Administration is not arguing for the application of strict scrutiny in this "reverse" sex discrimination case because it now contends that all sex-based classifications should be subject to strict scrutiny; rather, its concern appears to be limited to the protection of the male claimant in this case from what it chooses to characterize as "intentional discrimination." Nor does the Administration admit that its position in this regard conflicts with prior rulings of the Court, even if constitutional standards were relevant. Every Justice has adopted one of two positions: (1) the same standard of scrutiny under the Constitution applies to every sex- or race-based classification, *e.g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 *n. 9* (1982) (sex); *Wygant*, 106 S.Ct. at 1846 (race) (Powell, J., Burger, C.J., Rehnquist and O'Connor, JJ.), or (2) a lowered standard of scrutiny applies to classifications intended to benefit historically disadvantaged groups, *e.g.*, *Hogan*, 458 U.S. at 741 (Powell and Rehnquist, JJ., dissenting); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in judgment in part and dissenting in part). Both positions are flatly contrary to the idea that strict scrutiny applies to a public employer's sex-based affirmative action plan. In short, the Administration's position would allow substantial latitude for employers to justify a sex-based classification that harms women while making it much more difficult for employers to justify such a classification that harms men.

The Administration further opposes the Transportation Agency plan because, it suggests, the agency did not have sufficient evidence to conclude under *Wygant* that there was a need to redress prior discrimination, even though the job category at issue -- "Skilled Craft Workers" -- had 238 positions, *not one* of which had a female incumbent when the plan was devised. Given these extreme facts, it is difficult to imagine that the Administration ever would concede that a statistical disparity supported a classwide remedy.

* * *

Affirmative action is required to secure equal opportunity for women in the workforce, by helping women to overcome the barriers to their employment in traditionally male jobs and to end sex-based occupational segregation. Notwithstanding the intransigence of the Reagan Administration, we are hopeful that the promise of equal employment opportunity for women can be fulfilled. The Supreme Court continues to support affirmative action in circumstance where it is needed to redress discrimination. Unfortunately, however, vigilance is needed to ensure that the Administration adheres to the law and enforces the law rather than thwarts its mandate.

Mr. **Martinez.** We'll next go to Ms. Marano.

STATEMENT OF CYNTHIA MARANO

Ms. **Marano.** Good morning, Congressmen Martinez, Hayes, and Waldon.

I'm Cynthia Marano, executive director of Wider Opportunities for Women, a national women's employment organization located here in Washington, DC.

WOW is a nonprofit organization which works to create systematic change in employment policies, programs, and practices to ensure economic independence and equality of opportunity for women.

Since 1964, WOW has provided outreach, career counseling, skills training, educational assistance, job development, and job placement for more than 2,000 women in the Washington, DC, area.

Since 1977, WOW has also provided leadership to a national network of community women's employment and training programs, public administrators, employers, and other policymakers interested in expanding women's employment options.

Today, that network reaches into 38 States and into the lives of 300,000 individual women who seek to improve their employment opportunities.

I'm going to try to summarize my statement this morning and ask that you include the full statement in the record.

I am very pleased to have the chance to come before you again to discuss the role of affirmative action in expanding the labor market for women.

As in previous testimony, I'm going to talk with you today about the effect of affirmative action policy in opening up nontraditional opportunities for women.

It's undeniably the case that women have made great progress during the past two decades in labor force participation and in barrier breaking moves into occupations generally considered the domain of men only.

A report of the Potomac Institute issued earlier this year, "A Decade of Opportunity: Affirmative Action in the 1970's," reveals that women's share of the private job market rose from 34.4 percent to 41.1 percent during the 1970's.

The report also documents notable increases in white-collar categories, officials and managers, professionals, and technicians.

Women have accounted for more than three-fifths of the increase in the total labor market over the past decade, about 13.7 million women as compared to 8.4 million men.

By 1990, women are expected to make up 50 percent of the labor force. And, as you know, women's labor statistics have increased in all of the ways that are outlined in our testimony.

We at WOW are keenly aware of both the problems and the progress experienced by women in these areas.

We train women who continue to have difficulties entering nontraditional and high wage employment, even with skills training.

And we work with programs across the country to seek job placements for women in the construction trades, in technical and mechanical industries, in public utilities, in the transportation field, in police and firefighting careers, in the petroleum and coal industries, in self-employment, and in other occupations which continue to be predominately male.

All of those programs have some difficulty in finding good placements for their women.

In Washington, DC, WOW has seen the effects of affirmative action at close hand. And the affirmative action policy of the last decade in particular did make a difference.

In its early work to gain access for women to construction trades employment, WOW met with resistance, skepticism, and downright hostility.

With affirmative action pressure on local Federal contractors, WOW began to train and place women in construction work in the late 1970's.

In 1982, when CETA dollars were no longer available to support this training, District of Columbia area construction contractors and unions formed a consortium to provide financial support for such training.

Today, in the metro area, though that program is no longer in existence, female journeypersons are visibly at work in several key trades.

A number of minority women own construction firms. And the climate has changed dramatically.

While the metro construction industry is far from high female, it is no longer fully segregated either by race or sex.

It's our hope that this kind of progress will continue. But we have little reason to assume that we can count on it.

WOW's experience in Washington, DC, extends into the technical arena as well. Major technical employers now sit down at the table with WOW, discuss pretraining options for women, provide internships to introduce technical work to women, and provide in-kind support for training.

While problems continue to exist, progress cannot be denied.

But the progress has not occurred in a vacuum. Our Nation's drive for equal opportunity, its statutes and regulations designed to codify this drive, and the victims and advocates willing to put the policies to the test through the court system have fueled that progress.

Women continue to be segregated in the labor market. We are still vastly underrepresented in such high demand occupations as engineering and the high tech industries.

In 1984, WOW conducted a study of four high technology industries, industries reputed for their progressive personnel and human resource policies, to determine the status of female employment now and female employment opportunities for the future.

Many of the firms and occupational groupings reviewed were Federal contractors. Most have a high growth profile.

WOW found the following. Widespread prevailing occupational segregation, a visible lack of women and minorities in the highest paid and most responsible positions, a persistent wage gap in positions where males and females were employed.

Only in the telephone industry, where there has been considerable affirmative action scrutiny and litigation, was progress in the movement and promotion of women apparent.

That occupational segregation and discrimination persist in these newer and more dynamic growth industries is a testament to the continuing need for affirmative action and its enforcement.

In some sense, we may be experiencing a crisis in these industries.

It has been estimated that a large percentage of women are concentrated in jobs that are going to be changed, eliminated, or made obsolete by technological change and automation.

If opportunities in the more nontraditional fields in high technology do not expand, women's employment status will be seriously hurt.

The public sector is not particularly more reassuring.

San Francisco Women in the Trades, a municipal employees' group interested in improving the status of women in nontraditional jobs in that city, studied San Francisco's record of hiring women in nontraditional skilled occupations last year.

San Francisco has an affirmative action policy statement requirinq 45 percent of nontraditional jobs be filled by women.

But the good intentions of city elected officials have not been really carried out in the hiring practices.

Women in the Trades found women in only 1 of the city's 60 plumbing job, 1 of the 73 auto mechanic positions, 2 of the 145 stationary engineering positions, 17 of the 222 laborer positions, and 4 of the 250 engineering jobs.

Every one of San Francisco's electrical and plumbing inspectors, firefighters, and police sergeants and lieutenants were male.

In the same State, according to the Southeast Women's Employment Coalition, which released a study of affirmative action compliance in the department of transportation in six States last year, transportation employment for women is highly sex segregated.

In 1983, the California Department of Transportation had 14,763 employees, 17 percent of whom were female.

Of the women employed by the California Department of Transportation, more than half were employed in office or clerical jobs.

The department underemployed women in all affirmative action categories. And to reach parity with the civilian labor force the department would have had to have hired 5,306 women and minority males.

In Santa Clara County, where the just—where the *Johnson* case has drawn such attention, the department's record of hiring women across the broad spectrum of jobs was abysmal.

You heard about this from Marcia in her testimony.

At the time of the promotion in question in the case, not one of the 238 skilled craft positions in the department was held by a woman.

If hiring or promoting a woman in a single job situation is to be interpreted by the administration as barring men from these jobs or if the facts in this case do not seem appropriate evidence of discrimination, it seems clear that the capacity of affirmative action measures to intervene in all but a few discriminatory situations will be severely limited.

This will have a damaging and widespread impact upon women seeking nontraditional employment.

Affirmative action goals and timetables and enforcement are not adversarial unless the adversary is discrimination.

When it works well, and WOW believes that it had just begun to do so before the controversies in the Reagan administration have called its very existence into question, affirmative action policy works well for all concerned.

Business has told us that. So has the data. The visible changes in the work force and the improved economic status of those it has benefited.

Affirmed action correctly applied identifies a problem, defines and plans ways to solve the problem, and monitors to see that the problem is being addressed.

It's a familiar American message of can do. And in this case the can do relates to the elimination of discrimination in employment. Without it or with its undermining, our society will continue to face barriers to economic and social progress we thought were behind us decades ago.

I thank you for the chance to talk with you today and look forward to your questions.

Mr. MARTINEZ. Thank you, Ms. Marano.

[The prepared statement of Cynthia Marano follows:]

PREPARED STATEMENT OF CYNTHIA MARANO, EXECUTIVE DIRECTOR OF WIDER OPPORTUNITIES FOR WOMEN

Good morning. I am Cynthia Marano, Executive Director of Wider Opportunities for Women, a national women's employment organization, located in Washington, D.C. WOW is a non-profit organization which works to create systemic change in employment policies, programs, and practices to ensure economic independence and equality of opportunity for women. Since 1964, WOW has provided outreach, career counseling, skills training, educational assistance, job development, and job placement for more than 2,000 women in the Washington, D.C. metropolitan area. Since 1977, WOW has also provided leadership to a national network of community women's employment and training programs, public administrators, employers, and other policy makers interested in expanding women's employment options. Today, that network reaches into 38 states and into the lives of 300,000 individual women who seek to improve their employment opportunities.

I am pleased to come before the Subcommittee once again to discuss the role affirmative action has played in expanding the labor market for women. As in previous testimony, I will talk with you today about the effect of affirmative action policy in opening up nontraditional employment options for women. Today I will also explore why such policies must be retained, enforced, and monitored at the national, state, local administrative and judicial levels if we hope as a nation to affect the occupational segregation which has had such a deleterious economic impact on women and their families.

Affirmative action is probably one of the least understood but most effective remedies used in the history of the U.S. to address discrimination. Our more than 40 years of contract compliance and other affirmative action experience is now being studied by several countries in the European Economic Community. The policy is being supported by a wide range of major corporations, by civil rights and women's advocates, by churches, and by the majority of mainstream Americans as evidenced in a Harris poll last year.

But discrimination against women in the employment arena is a long entrenched and difficult to overcome social reality. In 1873, a Supreme Court justice wrote:

> "Man is, or should be, women's protector and defender. This natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of life."

Obviously this perspective reflects an era which ought to be behind us. The data on women's contribution to family earnings both in households headed by women alone and in those in which women contribute vital second incomes indicates the importance of women's participation in and need for adequate remuneration from the work force. Data also indicates the serious and persistent gaps between the work force status and earnings of women and men, especially white men.

Affirmative action was designed to provide redress for those who have been subjected to official, governmentally sanctioned discrimination. For years, Blacks and Hispanics were the targets of laws which segregated them in public schools, banned them from opportunities in public and private employment. Likewise, women were barred from educational opportunities, restricted from areas of training, and impeded in their access to the job market by "protective legislation."

Affirmative action policies reflect the recognition of leaders of both major parties and all aspects of government that neutral policy is not sufficient to bring about changes in employment practices, training programs, and other vehicles through which women and minority males are being systemically denied access to opportunity. The role of affirmative action -- "to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future," -- is vital in our society and will continue to be so until race, sex, and other forms of discrimination are matters of history. It is a pragmatic, problem-solving approach to centuries of structural, conscious and unconscious discrimination, which if left unchecked, will simply perpetuate itself.

Affirmative action is needed because discrimination continues to pervade the labor market and has devastating consequences for the women and minority males it affects. It is needed because, as the Civil Rights Commission wrote in November, 1981: ..."when discrimination is widespread and entrenched, it becomes a self-regenerating process, capable of converting what appear to be neutral acts into future discrimination." WOW believes, as the Commission wrote at that time:

> "...measures that take no conscious account of race, sex, or national origin often prove ineffective against processes that transform "neutrality" into discrimination. In such circumstances, the only effective remedy is affirmative action, which responds to discri-

> mination as a self-sustaining process and dismantles it."

Both the progress of the last two decades and the continuing impact of employment discrimination on women and minority males lead WOW to urge this Subcommittee to continue its concern about and vigilance over the maintenance and enforcement of affirmative action.

The Progress

It is undeniably the case that women have made great progress during the past two decades in labor force participation and in barrier-breaking moves into occupations generally considered the domain of "men only." A report of the Potomac Institute, issued earlier this year -- A Decade of Opportunity: Affirmative Action in the 1970's -- reveals that women's share of the private job market rose from 34.4% to 41.1% during the 1970's. The report also documents notable increases in female participation in the top three white collar categories: officials and managers (up from 10.2% to 18.5 %), professionals (up from 24.6% to 37.7%), and technicians (up from 26.4% to 40.2%).

Women have accounted for more than three-fifths of the increase in the total labor market over the past decade -- about 13.7 million women as compared to 8.4 million men. By 1990, women are expected to make up 50% of the paid labor force. In 1983, 49% of the Black labor force was female; 43% of the white labor force was female; and 40% of the Hispanic labor force was female. Yet women are not even close to achieving a 50% participation rate in most occupations -- especially those with highest wages, promotional opportunities, and benefits. The result is that women's work in the paid labor force remunerates women less, is less likely to lead them to positions of authority and decision-making, and is more likely to be economically unstable.

We at WOW are keenly aware of both the problems and the progress experienced by women in these areas. We train women who continue to have difficulties entering nontraditional and high wage employment-- even with skills training -- and we work with programs across the U.S. who seek job placements for women in the construction trades, in technical and mechanical industries, in public utlities, in the transportation field, in police and firefighting careers, in the petroleum and coal industries, in self-employment, and in other occupations which continue to be predominantly male.

In each of these career areas, affirmative action has played a critical role: first in stimulating the development of training; then in ensuring a fair shot at placement for the women trained; and finally, in assisting the women placed in some stability of employment and chances for advancement. Progress has been most apparent in those fields where affirmative action was most vigorously pursued, enforced, or litigated.

Between 1960 and 1980, there was a great influx of women into the skilled trades. By 1981, the U.S. Department of Labor reported 802,000 women employed in these fields -- four times the number reported in 1960. While less than 20% of the jobs continue to be held by women, this progress is dramatic. WOW contends that the progress was due largely to affirmative action and the resulting increase in training opportunities, role models, and support for women successfully entering and maintaining skilled trade jobs.

In the Washington, D.C. area, WOW saw the effects of affirmative action at close hand. In its early work to gain access for women to construction trades employment, WOW met resistance, skepticism, and downright hostility. With affirmative action pressure on local federal contractors, WOW began to train and place women in construction work in the late 70's. In 1982, when CETA dollars were no longer available to support this training, DC area construction contractors and unions formed a consortium to provide financial support for such training. Today, in the metro area, female journeywomen are visibly at work in several key trades. A number of minority women own construction firms, and the climate has changed dramatically. While the metro construction industry is far from half female, it is no longer fully segregated either by sex or race. It is our hope that this progress will continue, given that enforcement activities have been cut back.

WOW's experience in Washington, D.C. extends into the technical arena as well. Major technical employers now sit down at the table with WOW, discuss pre-training options for women, provide internships to introduce technical work to women, and provide in-kind support for training. While problems continue to exist, progress cannot be denied.

These experiences are reinforced by two studies of the effects of Executive Order 11246 on the employment of women and minority males. These studies -- "A Review of the Effect of the Executive Order 11246 and the Federal Contract Compliance Program on the Employment Opportunities of Minorities and Women" by V. Griffin Crump (1984) and "The Impact of Affirmative Action," by Jonathan Leonard (1983) -- reviewed the performance data of federal contractors from 1974-1980 to assess the effect of the program on the employment of the "protected groups." Both studies documented significant impact of the program in increasing opportunity. Affirmative action has had demonstrable success. Its affect upon the American workplace is evident.

The Continuing Impact of Discrimination

We have made progress. But the progress has not occurred in a vacuum. Our nation's drive for equal opportunity, its statutes and regulations designed to codify this drive, and the victims and advocates willing to put the policies to the test through the court system have fueled that progress.

And women continue to be segregated in the labor market. We are still vastly under-represented in such high demand occupations as engineering and the high tech industries.

In 1984, WOW conducted a study of four high technology industries -- industries reputed for their progressive personnel and human resource policies -- to determine the status of female employment now and female employment opportunities for the future. Many of the firms and occupational groupings reviewed were federal contractors. Most had a high growth profile.

WOW found the following:

** widespread, prevailing occupational segregation;

** a visible lack of women and minorities in the highest paid and most responsible positions;

** a persistent wage gap in positions where males and females were employed.

Only in the telephone industry, where there has been considerable affirmative action scrutiny and litigation, was progress in the movement and promotion of women apparent.

That occupational segregation and discrimination persist in these newer, more dynamic, and high growth industries is a testament to the continuing need for affirmative action and its enforcement. In some sense, we may be experiencing new crises in these industries. It has been estimated that 80%

of women are concentrated in jobs that will be changed, eliminated, or made obsolete by technological change and automation. If opportunities in the technical arena do not expand, women's employment status will be seriously hurt.

The public employment sector is not substantially more reassuring, if one looks at the nontraditional arena.

San Francisco Women in the Trades, a municipal employees group interested in improving the status of women working in nontraditional jobs in the city, studied San Francisco's record of hiring women in nontraditional, skilled occupations last year. San Francisco has an affirmative action policy statement requiring 45% of nontraditional jobs be filled by women. But the good intentions of city elected officials have not been carried out in city hiring practices. The record is dismal.

Women in the Trades found women in only one of the city's 60 plumbing jobs; 1 of the 73 auto mechanic positions; 2 of the 145 stationary engineering positions; 17 of the 222 laborer positions; and 4 of the 250 engineering jobs. Every one of San Francisco's electrical and plumbing inspectors, firefighters, and police sergeants and lieutenants were male. And these findings are especially ironic, since San Francisco has the largest population of skilled tradeswomen of any major metro area in the country.

In the same state, according to the Southeast Women's Employment Coalition, which released a study of affirmative action compliance in Department of Transportation employment in six states last year, transportation employment for women is highly sex segregated. In 1983, the California Department of Transportation had 14,763 employees, 17% of whom were female. Of the women employed by the CADOT, more than half were employed in office or clerical jobs. The Department underemployed women in all affirmative action categories, and to reach parity with the civilian workforce, CADOT would have had to hire 5,306 women and minority males.

In Santa Clara County, California, where the Johnson case has drawn such attention, the department's record of hiring women across the broad spectrum of jobs was abysmal. The department had an affirmative action plan in place and moved to implement it. The county had as its goal to attain a workforce composition of women, minorities, and the handicapped which mirrored the incidence in the county of these groups. They did not set quotas to achieve this but had articulated the goal in the plan. At the time of the promotion in question, not one of the 238 skilled craft positions in the department was held by a woman. If hiring or promoting a member of one of the "protected groups" in a single job situation is to be interpreted by the EEOC or others as barring men from these jobs, it seems clear that the capacity of affirmative action measures to intervene in all but a few discriminatory situations will be severely limited.

Situations like these point to the continued need for vigorous affirmative policy, clear goals and timetables to overcome current patterns and practice, and enforcement of affirmative action policy at the national, state, and local levels with the courts upholding the intent and meaning of the policy.

Consequences

While systemic, institutional denial of opportunity results in many dire consequences for the nation, the most dramatic and visible can be seen today in the poverty of women and female headed families.

The poverty rates of women and women who head families are a stark consequence of employment discrimination. In 1983, women represented 61% of all persons aged 16 and older who had incomes below the poverty level. Nearly 72% of Black families with incomes below the poverty level (including 3.2 million children) were headed by women alone. For such women, who envision marginal, minimum wage and no-benefit jobs as their only employment prospects, it is not enough to talk about a color and sex-bias free society. For such women, even investment in education will not guarantee a different future. Women with high school diplomas earn less than men who have dropped out of elementary schools. Affirmative action is critically needed.

Enforcement

But, of course, affirmative action is the law of the land. And the use of goals and timetables has been upheld by the Supreme Court. What we have learned over the past decade, however, is that the policies alone are not enough. They must be enforced. Leadership in their enforcement must come from the federal agencies assigned their enforcement, from elected officials who must not tolerate inaction in the area of discrimination, from employers who must show a good faith effort, and from the courts.

Affirmative action, goals and timetables, and enforcement are not "adversarial" unless the adversary is discrimination. When it works well -- and WOW believes that it had just begun to do so before controversies in the Reagan Administration has called its very existence into question -- affirmative action policy works well for all concerned. Business has told us that. So has the data, the visible changes in the workforce, and the improved economic status of those it has benefitted. Affirmative action, correctly applied, identifies a problem, defines and plans ways to solve the problem, and monitors to see that the problem is being addressed. It is a familiar American message of "can do." And, in this case, the "can do" relates to the elimination of discrimination in employment. Without it -- or with its undermining -- our society will continue to face barriers to economic and social progress we thought were behind us decades ago.

Wider Opportunities for Women is appreciative of the oversight of this Subcommittee in the area of affirmative action and its enforcement. We ask you to take an active role in assessing the current status of enforcement and the actions of enforcement officials and bodies in carrying out current policy. We rely upon you, the Department of Labor, and the courts to ensure that current policy is carried out and that the progress of the past is not brought to a halt.

Mr. **Martinez**. And with that we will go to Ms. Withers.

STATEMENT OF CLAUDIA WITHERS

Ms. **Withers**. Good morning, Mr. Martinez, Mr. Hayes, and Mr. Waldon.

My name is Claudia Withers. And I'm a staff attorney at the Women's Legal Defense Fund.

We appreciate the opportunity to reaffirm publicly our commitment to the concept of sex conscious affirmative action goals and to assert the need for their continuing use in achieving equal employment opportunity for women, especially for women of color.

The Women's Legal Defense Fund is a private nonprofit organization founded in 1971 and dedicated to the elimination of discrimination based on sex.

Since that time, we have challenged sex based inequities through litigation, advocacy, and public education.

Most recently, we coauthored an amicus brief filed yesterday in *Johnson* v. *Santa Clara County Department of Transportation*, the Supreme Court's first case to address the lawfulness of affirmative action goals for women.

We focus our written testimony and our comments today on the position of women of color in the work force.

All of us testifying before you, of course, represent the interest of all women, regardless of race or national origin.

However, we believe it important for the subcommittee to be informed specifically of the status of women of color.

Historically and currently, women of color have labored under a double burden of discrimination.

Too often, discussions of discrimination are couched in the terms women and minorities.

It is altogether too easy for the listener and sometimes the speaker to forget that we are not talking solely about white women and minority males.

In general, women of color have not shared wholly in the modest advances made by white women and men of color.

Black and Hispanic women remain crowded in disproportionate numbers into low-paying women's work and are overrepresented among the Nation's poor.

For this reason, it is particularly pressing to women of color that affirmative action measures continue to be zealously promoted and pursued.

Employment discrimination against women in general, of course, is not a new phenomenon. And it continues to have severe effects on the employment status of all women.

Legal and societal restrictions have long dictated that women's sphere should not expand beyond her natural role of wife and mother. Thus, historically, occupations in which women have found employment were those in keeping with their domestic role. And the pay for such work has always been low, justified by the belief that women were only working until such time as they could marry and be supported by their husbands.

Black women, who have always participated in the labor force in greater numbers than white women, have historically worked as domestic servants and personal servants, indicative of the stereotypes attributed to their gender and their race.

Despite the recent gains noted by other witnesses before you this morning, the vast majority of women remain segregated into low wage, deadend jobs with little hope of advancement.

Black and Hispanic women, as well as other women of color, similarly continue to be clustered into those kinds of jobs.

Black women generally hold the lowest paying of traditionally female jobs, child care workers, nurse's aides, food counter workers, file clerks.

Hispanic women, while also employed as clericals, are employed to a greater extent than other women in operative jobs, such as dressmakers, assemblers, and machine operators.

Women's earnings also reflect continuing discrimination, with a dramatically greater impact on women of color.

In 1985, the average woman age 25 or over, working year-round, full time, with at least 4 years of college, earned 64 percent of the salary of a similarly situated male.

For women of color, the disparities were greater. Black women earn about 58 cents for every dollar earned by a man. Hispanic women, 55 cents.

Continuing employment discrimination and segregation into low paying jobs translates directly into poverty for women and their children.

In 1983, nearly 50 percent of all poor families were headed by women. Of these households, a disproportionate number were headed by women of color.

Nearly 72 percent of black families and 46 percent of Hispanic families with income levels below the poverty line were headed by women, as compared to 37 percent of white families.

Discrimination and the resulting inability of women to obtain well paying jobs ensures that great numbers of women will remain below the poverty line, with a disproportionately greater impact on women of color.

There are remedies for these problems. But these remedies require action. So-called neutral nondiscrimination is simply not enough.

In the face of the continuing effect of societal stereotyping and discrimination, there can be no such thing as neutrality.

We submit that affirmative action is needed to help women achieve equal employment opportunity and economic self-sufficiency.

Affirmative action works. Recent studies confirm that affirmative action has been effective in promoting the employment of women in nontraditional jobs.

Indeed, one study has noted that affirmative action goals were the single best predictor of future employment demographics.

Affirmative action has opened new doors for women. However, the disproportionate presence of women in low-paying jobs and among the Nation's poor testifies to the fact that the positive changes that have occurred have simply not been enough.

Thus, it is clear that support of affirmative action measures must not only be maintained, but must be redoubled if women, especially women of color, are ever to achieve equal employment opportunity.

Thank you.

Mr. **Martinez**. Thank you, Ms. Withers.

[The prepared statements of Claudia A. Withers and Ruth Zacarias follow:]

PREPARED STATEMENTS OF CLAUDIA A. WITHERS AND RUTH ZACARIAS, WOMEN'S LEGAL DEFENSE FUND

The Women's Legal Defense Fund appreciates the opportunity to reaffirm publicly its commitment to the concept of sex-conscious affirmative action goals and to assert the need for its continuing use in achieving equal employment opportunity for women -- especially for women of color.

The Women's Legal Defense Fund is a private, non-profit organization of over 1,500 members, based in Washington, D.C., and founded in 1971, to challenge sex-based inequities through litigation, advocacy before public agencies, and public education. WLDF provides, among other things, counseling and pro bono representation in cases of sex-based employment discrimination. WLDF volunteer attorneys have represented plaintiffs and participated as amicus curiae in a number of major sex discrimination cases since the organization's inception; most recently, we co-authored the brief amicus curiae filed yesterday in Johnson v. Santa Clara County Transportation Agency, the Supreme Court's first case to address the lawfulness of affirmative action goals for women.[1] In addition to the direct services that WLDF provides to the community, it has for over 10 years monitored the performance of federal agencies charged with the enforcement of equal employment opportunity laws. We are, therefore, fully equipped to comment on the status of women in the workplace and the need to improve that status through affirmative action.

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[1] The brief was filed on behalf of a number of women's and civil rights organizations, including Women Employed and the National Women's Law Center, also testifying before you today, as well as the NAACP Legal Defense and Education Fund, the American Civil Liberties Union, and the National Organization for Women (among others).

We focus our comments today on the position of women of color in the workforce.2 All of us testifying before you today represent the interests of all women, regardless of race or national origin; however, we believe it important for the Committee to be informed specifically of the status of women of color. This is because historically and currently, women of color have labored under a double burden of discrimination based upon sex and race or national origin. Too often, discussions of discrimination are couched in the terms "women and minorities"; it is altogether too easy for the listener, and sometimes the speaker, to forget that we are not talking solely about white women and minority males.

Yet women of color, notably Black women, have not shared wholly in the modest gains made by white women or by men of color. Black and Hispanic women remain crowded into low-paying women's work and are disproportionately overrepresented among the nation's poor. For this reason, it is particularly pressing to women of color that affirmative action measures continue to be zealously promoted and pursued.

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2 For the purposes of this testimony, and due to the lack of available data, WLDF focuses on the position of Black women, and to a degree on the position of Hispanic women, while recognizing fully that other women of color (notably Asian, Pacific Island, and American Indian women) also labor under the burdens of stereotyping and discrimination.

To put the needs and problems of women of color in the workplace today in perspective, we will first present some history of discrimination against women in America in general, and then discuss the similarities and differences between the employment experiences of white women and of women of color.

Employment discrimination against women in general is not a new phenomenon. It is the result of a society that traditionally excluded women from any role but that of homemaker, and of a legal system that maintained this exclusion by relegating women to the legal status of little, if anything, more than a mere appendage to their husbands. Like the effect of Jim Crow laws on blacks, the laws pertaining to the status of women have contributed enormously to the exclusion of women from the employment sphere and to the present sexual composition of the workforce and the accompanying undervaluing of women's work. The theory underlying the legal and societal restrictions on women's work was based on the belief that women's natural role was that of wife and mother, and that women neither should nor could venture outside that sphere.

Thus, when women did begin to work outside the home in large numbers, the occupations in which they found employment where those in keeping with domestic roles; they became, *e.g.*, bakers in factories, or workers in laundries, in private homes, or in the textile and clothing industries. The pay for such work was low, justified by the societal belief that women were working only until such time as they could marry and be supported by their husbands.3 Married women, it was assumed, worked only for pin money. Thus began the segregation of women into low-paying "women's work"--for example as teachers, nurses, and clerical workers.4

Furthermore, decades of "protective" legislation limiting the work hours of women in some industries had the effect of excluding white women and women of color alike from many higher-paying positions, such as newspaper printers, street car conductors, and telegraph messengers, which required longer or different hours than those the laws permitted. In some instances, legislation barred women from certain traditional "men's" jobs altogether, such as policing, mining, and bartending.

Women's present employment opportunities are no longer legally restricted. However, the underlying attitude that women do not belong in the workplace remains, and it is prevalent. The status of women in the workforce, and the types of jobs they hold, still reflect both the legacy of legally and societally sanctioned discrimination and stereotyping.

Nevertheless, women in general have moved into the workforce in unprecedented numbers in the past decade.5 As women have

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3 Baxendall, Gordon, and Reverby, eds., America's Working Women: A Documentary History--1600 to the Present (1976).

4 See WLDF, "'Women's Place' in the Workforce: History, Economics and Law" (adapted from Testimony before the Equal Employment Opportunity Commission) (1980).

5 U.S. Department of Labor, Women's Bureau, 20 Facts on Women Workers (1984) (hereinafter cited as 20 Facts).

moved into the workforce, they have begun to make inroads into what was traditionally men's work. For example, by 1981 there were more than 802,000 women employed in the skilled trades, more than double the number in 1970 and almost four times the number in 1960.6 These important gains notwithstanding, the general status of women in the workforce has changed very little; the vast majority of women remain segregated into low wage, dead-end obs with little hope of advancement. Clerical work continues to occupy most women. And the fact remains that the few inroads made by women into higher paying, traditionally male jobs have generally remained closed to Black and Hispanic women.

Indeed, in general, because of the double burden of sex and race or national origin discrimination, women of color have not shared proportionately in the advances made by white women. For women of color, the advances have been smaller, the disparities much greater.

Historically women of color, particularly black women, entered the workforce in large numbers long before white women did. Women's work and wages have been essential to the survival of the black family since the time of slavery. The traditional American myth that the woman must remain in the home while the husband goes out to support the family has never had a significant place in Black families. Thus, as early as 1890, two out of five black women over the age of 10 were in non-farm occupations. By 1950, this figure had risen to 46%; by 1967, to

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6 20 Facts, supra.

49.5%, and by 1978, to 53%.[7] By 1984 Black women were most likely of all women to be in the labor force (55%), followed by white women (53%), and Hispanic women (49.8%).[8] The closeness in numbers of working Black and white women is the result of the recent influx of white women into the labor force.

Once in the workforce, Black women workers bore the brunt of double discrimination, and were segregated into even lower paying jobs as domestic workers, jobs that were considered both "black" and "women's" work.Black, as well as Hispanic, women continue to cluster in female-dominated occupations of an even higher rate than white women. Black women generally hold the lowest paying jobs, although Black women are less likely now than before to be occupied in private household domestic services, in which they have predominated in the past. Almost 60% of Black women are employed in clerical and service occupations.[9] Hispanic women, while also frequently employed as clerical and service workers, are employed to a greater extent than other women in operative jobs as dressmakers, assemblers and machine operators.10

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[7] Julianne Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies for Change 4 (January 1984) (unpublished paper prepared for the NAACP Legal Defense and Education Fund, Inc.) [hereinafter cited as Low Wage Black Women].

[8] Reskin and Hartman, eds., Women's Work, Men's Work Sex Segregation on the Job (1986)

[9] Low Wage Black Women, supra, at 8, 12-13.

It is thus not surprising that women's earning levels reflect continuing discrimination with a dramatically greater impact on women of color. In 1985, the average woman aged 25 or over, working year-round, full-time, with at least four years of college, earned 64% of the salary of a similarly-situated male.11 Women of color hold a considerably worse position. Black women earn about 59 cents for every dollar earned by a similarly-situated man. For each dollar earned by a similarly-situated man, Hispanic women earn 55 cents.12

The employment status of women of color, like that of white women, has seen some improvement due to wider opportunities for women in general, changing societal attitudes, and affirmative action measures. For example, Black women have made inroads into traditionally male occupations such as bus driver, truck driver and delivery person.13 And more Hispanic women are moving into white-collar positions. These improvements, however, must be placed in perspective: fewer than 2% of all attorneys and fewer

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10 U.S. Department of Labor, Women's Bureau, Time of Change: 1983 Handbook on Women Workers, 30 (hereinafter cited as Time of Change).

11 U.S. Department of Labor, Women's Bureau, The United Nations Decade for Women, 1976-1985: Employment in the United States 12 (July 1985).

12 U.S. Department of Labor, Bureau of Labor Statistics,

than 3% of all scientists, physicians and architects are black women. 14 Hispanic women have not fared much better. It remains true that the positions most often taken by Black and Hispanic women are the lowest of the already low-paying jobs still deemed "women's work."

Continuing employment discrimination and the segregation of women into "women's work" translates directly into poverty for women of color and their children. In 1981 about one in five women workers maintained families on their own. The numbers are even greater for women of color. For example, 1982 data reveal that 47.5% of all Black families are headed by only one parent (U.S. Bureau of the Census, 1981).

In 1983 women in general made up 61% of all individuals 16 or over who had incomes below the poverty line; 47% of all poor families were headed by women. Of these families, a disproportionate number were headed by women of color. Nearly 72% of Black families and 46% of Hispanic families with income levels below the poverty line were headed by women as compared to 37% of white families. Furthermore, of Black families headed by women, 53.8% had incomes which fell below the poverty line as compared to 28.3% of similarly-situated white families.15 Discrimination against women and the resulting inability of women to obtain well-paying jobs ensures that great numbers of women

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14 Low Wage Black Women, supra, at 13.

15 20 Facts, supra.

will remain below the poverty line, with a disproportionately greater impact on women of color.

There are remedies for these problems, but these remedies require action. So-called "neutral" non-discrimination of the type urged by the current Administration is not enough. In the face of the continuing effects of societal stereotyping and discrimination, there is no such thing as neutrality. Affirmative action, not acquiescence, is needed to help women achieve equal employment opportunity and economic standing. It is clear that affirmative action measures are crucial to all women and minority members. Without them a shameful traditional of sex- and race-based discrimination will continue. However, the status of women of color, their concentration in low paying "women's jobs," and their overrepresentation among the poor, make it all too clear that they are in urgent need of affirmative action.

Affirmative action works. Affirmative action has worked to open employment opportunities to women; it has worked to remedy the effects of historical and present discrimination. Recent studies reaffirm that gender- and race-conscious measures are necessary if women are to gain access to the employment opportunities from which they have been excluded in the past. For example, a 1983 study on federal enforcement of Executive Order 11426, compared federal contractor establishments, which are required to take affirmative action by setting goals and timetables, with noncontractor establishments. The study found that affirmative action had been effective in promoting the employment of women and minorities; indeed, the study concluded that affirmative action goals were the single best predictor of future employment demographics.16 The Office of Federal Contract Compliance Programs (OFCCP) reached the same conclusion in its study completed in 1984.17

Studies have also shown that affirmative action measures serve a double purpose. Not only do they encourage employers to recruit, hire and promote women, they also serve to inform women that jobs once closed to them are now an option. Affirmative action for women serves, just as it does for men of color, to tear down the walls of segregation. Once informed of new options, women quickly move into them.

Thus for example, in a 1977 review of the status of women in the construction field, the Office of Federal Contract Compliance Programs found that more women are available and interested in construction work than are participating. The data repeatedly presented examples of women applying for jobs from which they were once excluded as soon as those jobs became available to them. The review also concluded that as OFCCP set affirmative

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16 Jonathan Leonard, The Impact of Affirmative Action 25 (1983).

17 OFCCP, Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980, June 1984.

action goals for the hiring of women, the demand for women workers increased.18

Despite the success of affirmative action measures, the current status of women in the workforce shows how much ground is left to cover. White women and women of color alike continue to suffer sex discrimination in employment that results in their concentration in low-paying jobs and in their poverty. The advancements which made have been very small and although not to be undervalued, should not be overestimated and used as an excuse to retreat from affirmative action. Because of the burden of double discrimination, women of color in particular are still likely to be found in female-dominated occupations and have made fewer inroads into traditionally male occupations than white women. The disproportionate presence of Black and Hispanic women among the nation's poor testifies to the fact that the few positive changes that have occurred have simply not been enough; more must be done. Thus it is also clear that affirmative action measures must not only be maintained, but must be redoubled if women--and especially women of color--are to achieve equal employment opportunity.

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18 OFCCP, Women in Construction (May, 1981).

SUMMARY TESTIMONY
of the Women's Legal Defense Fund at the Subcommittee on Employment Opportunities Hearing on "Women in the Workforce"
September 29, 1986

--Claudia Withers
Ruth Zacarias

The Women's Legal Defense Fund appreciates the opportunity to reaffirm publicly its commitment to the concept of sex-conscious affirmative action goals and to assert the need for their continuing use in achieving equal employment opportunity for women--especially for women of color. To conserve time, I will orally present a Summary of our testimony; the full written testimony is also provided for the record.

The Women's Legal Defense Fund is a private non-profit organization dedicated to the elimination of discrimination based on sex. Most recently, we co-authored along with Women Employed and the National Women's Law Center, among others, the brief amicus curaie filed yesterday in Johnson v. Santa Clara County Transportation Agency, the Supreme Court's first case to address the lawfulness of affirmative action goals for women.

We focus our comments today on the position of women of color in the workforce. All of us testifying before you today represent the interests of all women, regardless of race or national origin; however, we believe it important for the Committee to be informed specifically of the status of women of color. This is because historically and currently, women of color have labored under a double burden of discrimination. Too often discussions of discrimination are couched in the terms "women and minorities"; it is altogether too easy for the listener, and sometimes the speaker, to forget that we are not talking solely about white women and minority males.

In general, women of color have not shared wholly in the modest advances made by white women and men of color. Black and Hispanic women remain crowded in disproportionate numbers into low paying "women's work" and are overrepresented among the nation's poor. For this reason, it is particularly pressing to women of color that affirmative action measures continue to be zealously promoted and pursued.

Indeed, employment discrimination against women in general is not a new phenomenon, and it continues to have severe effects on the employment status of all women. Legal and societal restrictions have long dictated that women's sphere should not expand beyond her "natural role" of wife and mother. Thus, the occupations in which women have found employment were those in keeping with their domestic roles, and the pay for such work has always been low, justified by the belief that women were only working until such time as they could marry and be supported by their husbands. The vast majority of women remain segregated into low wage, dead-end jobs with little hope of advancement, despite some recent gains.

Black and Hispanic women (as well as other women of color) similarly continue to cluster in female dominated occupations. Black women generally hold the lowest paying jobs. Almost 60% of Black women are employed in clerical and service occupations. Hispanic women are employed to a greater extent than other women in operative jobs as dressmakers, assemblers, and machine operators.

Women's earning levels also reflect continuing discrimination, with a dramatically greater impact on women of color. In 1985, the average woman aged 25 or over, working year-round, full-time with at least four years of college earned 64% of the salary of a similarly-situated male. Women of color hold a considerably worse position. Black women earn about 58 cents for every dollar earned by a similarly situated man; Hispanic women, 55 cents.

Continuing employment discrimination and the segregation of women into low-paying "women's work" translates directly into poverty for women and their children. In 1983, nearly 50% of all poor families were headed by women. Of these households a disproportionate number were headed by women of color. Nearly 72% of Black families and 46% of Hispanic families with income levels below the poverty line were headed by women as compared to 37% of white families. Discrimination against women and the resulting inability of women to obtain well-paying jobs ensures that great numbers of women will remain below the poverty line, with a disproportionately greater impact on women of color.

There are remedies for these problems, but these remedies require action. So-called "nuetral" non-discrimination of the type urged by the current administration is not enough. In the face of the continuing effects of societal stereotyping and discrimination, there is no such thing as neutrality.

Affirmative action, not acquiescence, is needed to help women achieve equal employment opportunity and economic standing.

Affirmative action works. Recent studies confirm that affirmative action has been effective in promoting the employment of women in nontraditional jobs. Indeed one study has concluded that affirmative action goals were the best predictor of future employment demographics.

Affirmative action has opened new doors to women; however, the disproportionate presence of women in low-paying jobs and among the nation's poor testifies to the fact that the positive changes that have occurred have simply not been enough. Thus it is clear that affirmative action measures must not only be maintained, but must be redoubled if women--especially women of color--are to achieve equal employment opportunity.

Mr. Martinez. Certainly your testimony, all of your testimonies, raise a lot of questions.

The paramount one, though, is why this administration cannot see that to eliminate discrimination and to remedy past discriminations that we need to have some means by which to accomplish this goal.

Ms. Greenberger, you testified about the scrutiny that takes place under two separate standards for the same discrimination case, whether it be against man or woman. And one has to be looked at with a lower standard and the other with a higher standard, a strict standard of proof for the man, but not for the woman.

Now, would you go in to that in a little more detail?

What kind of reasoning brings on that kind of a thought?

Ms. Greenberger. Well, I'm not sure that I would be able to describe reasoning, let alone put an adjective next to it, you know, in a public forum such as this, but I shall try.

But I think what we really see coming through, and what I believe is an inherent identification with the appropriateness of white males being in the positions that they are in, and having to make room for women, and minorities seems inherently unfair to some people.

And if affirmative action is going to open up opportunities, that seems to challenge, you know, on, I think, some very basic level, what people, some people, think is a way out of fairness or whatever the world has been structured traditionally.

And I think, while there's some tortured legal reasoning behind this brief submitted by the Justice Department, what they're really saying is they see discrimination against white males in affirmative action.

I don't think that's true to begin with. But they see it that way. And they say that is worse and more serious than discrimination against women.

And, so, the standard the Court should look at, when they see discrimination against men, should be stricter than the standard for discrimination against women. And that is, I think, a very telling and very dramatic statement that the Justice Department has made in this case.

Mr. Martinez. I guess, it's hard for me to understand that reasoning. It sometimes seems to be saying that we were ordained, this is our right, we were here first, based on the fact that, well, women have only come into the workplace in recent years and that traditionally women were those workers at home. It is archaic thinking, really.

But it seems to be the prevailing thought of this administration. The kind of thinking, where they say anytime you rectify some right, you cause reverse discrimination.

Ms. Greenberger. Well, that's right.

That's why I said I question the fact that there's discrimination against men to begin with with respect to affirmative action. That's certainly not the case.

On the other hand, and the thing that's so difficult to come to grips with is the punitive nature with respect to the policies and programs that this country has with respect to poor women. The fact that, on the one hand, there are these efforts to fight affirmative action and to eliminate the tools that have just begun to allow them to open up job opportunities and to support themselves and their families, and, on the other hand, to fight the public assistance programs that we have to assist women, the health programs to assist them and their children, the job training programs that we have, so that it really is, I think, a very cruel and heartless combination of policies and programs, to say the least.

And I think what's happened in this affirmative action context is the administration in race discrimination cannot help but admit what has been the law for a very long time, that where race discrimination is involved there is this heightened, strict scrutiny. And so they're arguing that with affirmative action you have to have the same scrutiny to protect white males.

And then they say, well, take that same scrutiny and use it to protect white males against sex discrimination challenges as well, even though we don't have that scrutiny to protect women.

Mr. **Martinez**. Well, I find that this administration has been masters at taking an exception and making it a rule in proving reverse discrimination.

And, certainly in anything, you can always find that one exception and magnify and make it seem as that's the general rule and that's why we shouldn't do that.

But, you know, they refuse to look at the facts as they exist.

For example, the Fortune 500 companies, there's only one minority male, and there are no women.

Ms. **Greenberger**. Right.

Mr. **Martinez**. And certainly that's got to be indicative of something.

Ms. **Greenberger**. Well——

Mr. **Martinez**. But they refuse to look at that.

Ms. **Greenberger**. It's the same as in the *Johnson* case, when they see over 200 positions in the job category and no women, and say, well, but is that evidence of discrimination?

That's certainly enough to warrant affirmative action to let a woman in.

Mr. **Martinez**. Ms. Marano, I know you want to say something about that. So, go ahead and say that, and then I'll ask you a question.

Ms. **Marano**. You can see I'm jumping at the chance.

The great irony is that some of those same Fortune 500 companies themselves see affirmative action policy as a way—as a good business way to plan for their own work forces.

And to have the administration argue against the Fortune 500 companies interested in trying to make some progress I find absolutely outrageous.

Mr. **Martinez**. Absolutely.

You know, I think in your testimony you indicated that in several areas there has been tremendous progress; both you and Ms. Krieter testified to that.

And I guess when you do make some progress and you can cite some statistics. That's another thing this administration is masterful at, taking a few statistics that are positive and portraying them as being the total picture, and saying now we can relax on affirmative action. Now we don't have to pursue it with the vengeance that we did in the past. Now we don't have to scrutinize those companies that are discriminating because it's all been taken care of—look at the statistics.

But I want you to emphasize, both of you, are these singularly small areas that have really maybe accomplished something, is there a vast majority that have not?

Ms. **Marano.** I'll just start by saying that we decided to do the study of the high technology firms because I think there is this consciousness or myth in the world that high technology firms have such marvelous human resource policies and are doing such a great job for women and minorities. The opposite is the case. When we looked at the occupational segregation of those firms, most of which are Federal contractors—occupational segregation was deeply entrenched.

When you looked at the San Francisco City or municipal jobs that I talked about in my testimony, in a city which has the highest number of skilled tradeswomen in the United States, and you would see one, or two, or no women in those kinds of positions, you realize that, while there has been progress, the progress is limited.

And if we don't very closely and vigorously monitor that progress and force it to continue, it won't.

Mr. **Martinez.** Ms. Krieter.

Ms. **Krieter.** I guess I have several things to say.

When I indicated the progress in the specific industries that were targeted for enforcement by the Federal Government, I'd like to emphasize that the employers showed no interest in getting rid of these inequities on their own, that it was the combination of Government enforcement, legal suits filed by many of the groups that you see sitting up here, other pressure tactics utilized by women's and civil rights organizations, in the days when affirmative action was on the books but not being enforced.

The other point I'd like to make is that, yes, we have seen progress. But what we're talking about in progress is a very simple notion of access. That when we talk about progress, I think we are all unanimous in feeling that we have opened up doors that were closed to women and minorities. But all we've done is gotten our foot into the door and gone no further.

And when the Reagan administration came along, the entire tone of enforcement, before we had the all out assault by the Justice Department and the enforcement agencies, encouraged employers with good records to, basically, breath easy and, quite frankly, be willing to say to us we have no fear of the enforcement mechanism, so that they were stopped in their tracks, no further progress occurred. And though those many, many hundreds of companies that had done nothing still continued to do nothing—so that when we use the word progress it has to be taken with a grain of salt as to what progress means.

Mr. **Martinez.** Thank you.

I'm going to ask the next question of Ms. Withers, but any one of you may want to answer as well. You alluded to the fact that along with being women blacks and Hispanics are at another disadvantage.

I know that from statistics we have seen that Hispanic women are going to be the hardest hit in the next 20 years. Look at the statistics simply of the high pregnancy rate among Hispanic young women. Becoming single parents at the age of 20, you know, really puts them at a disadvantage.

So, in that regard, realizing that discrimination and harassment, is an inherent part of our work place now, regardless of the progress we have made, can employers' attitudes really be affected by the Supreme Court decisions that have been made recently? And, more than that, can employers' attitudes be affected by strong agency enforcement? And, more than that, what can Congress do to ensure that women can attain and maintain equal opportunity?

Ms. WITHERS. Well, I think it's clear that the answer to your first two questions are undoubtedly yes.

The latest Supreme Court decisions are in affirming the concept of goals and timetables, let employers know that, indeed, what they are doing or should be doing is well countenanced within the law.

And clearly a strong Government enforcement presence is necessary and has been proved quite positive in advancing the status of women, particularly women of color, to the extent that they have been advanced.

What we believe Congress can do is what it is doing now and certainly more, with a vengeance, a strong, thorough, enthusiastic, vigorous, aggressive oversight of Government agencies, making sure that they are accountable to Congress and to those people that they are supposed to be protecting.

That particular aspect of their obligations has been in doubt the last 5 or 6 years.

So, I think those are the kinds of things that Congress can be doing.

Mr. MARTINEZ. Yeah.

Sometimes I think that they don't feel they should be accountable to Congress, but more to the administration and its philosophy——

Ms. WITHERS. Well——

Mr. MARTINEZ [continuing]. Which is wrong.

Ms. WITHERS. Certainly we've gotten that impression ourselves.

Mr. MARTINEZ. Anyone else?

Ms. Krieter.

Ms. KRIETER. I'd just like to make a comment that many of our organizations run discrimination counseling services, help women, minorities file charges.

Women Employed started this in the early 1970's. And the types of charges and complaints we were dealing with were the most obvious of occupational segregation, equal pay, very blatant sexual harassment.

And by the late 1970's the complaints were way more subtle in terms of continuing violations, promotions, problems.

There's been a total reversal on that. I mean our phone line, if we had taken a tape of the early 1970's, we could just replay it now, because the complaints are all the way back to equal pay for equal work, and what are my rights on that, and what agency do I call at a really alarming rate. And the same thing with sexual harassment, back to the very, very blatant sexual harassment, which I think, again, reflects the fact that there has been a tone set by this

Government to corporate America that you can get away with what you want to get away with. And that's a really serious problem.

Mr. **Martinez**. Yeah. I see that.

Mr. Hayes.

Mr. **Hayes**. Thank you, Mr. Chairman.

I think all of us agree up here that we've been benefited by some excellent testimony. But I guess I can philosophy a little bit rather than raise a question.

I'm not bubbling with optimism in terms of—in the—the—under the current administration and in terms of just maintaining our position, rather than to move forward in the whole area of affirmative action.

I'm a part of a 435-Member House of Representatives. About 25 I think—or 24—are female. One black.

We have a chance to increase that by 100 percent in Louisiana, and I hope we do.

Mr. **Martinez**. You'll make it. I endorsed it.

Mr. **Hayes**. All right.

But, too, it seems to, this subcommittee of ours, which I'm a part of, and it's headed by a very capable chairman from California, Congressman Martinez, is up against what seems to be almost insurmountable odds as we proceed to take a look at some of the problems you have raised.

And you are right, the question of reverse discrimination has become a tool that's used in order to overturn some of the progress that we've made, both in terms of race—and I think it's going to be used in terms of sex in order to do it.

An example, a most recent example, which I'm most familiar with in Chicago, where the goals and timetables that the city of Chicago set in order to eradicate some of the discriminatory hiring practices in the police department, one of the courts just reversed that by an award of damages into the millions to some of the—where they came—claim now are victims of reverse discrimination.

No one was replaced. It's just that when you hire, you hire so many blacks or Hispanics as replacements as people retire or die.

And they said that because they hired more blacks, I guess, based on the goals and timetables they'd set, that there was reverse discrimination against whites.

Now, of course, the city of Chicago is going to appeal it.

But I know this kind of decision is going to be looked at and viewed with much hope on the part of some people who want to reverse what has been done, including our U.S. Supreme Court.

And when you look at the other side of the coin, what you mentioned, Ms. Withers, which concerned me an awful lot—I represent a very poor district, where we have a lot of single parents, women who are heads of households, many of who are struggling below the poverty line. Some obviously would like to escape it with kids.

I have teenagers now—kids giving birth to kids, with no hope to the future unless we try to help them.

The dropout ratio in our high schools is reaching astronomical proportions of 50 percent almost.

So, the—it really disturbs me, too, a lot, as a Member of Congress, one who has reached what I would categorize as being in the twilight zone of what has been an interesting career.

But I'm hopeful to be able to do something. But I'm not very optimistic about it.

It's just I want to remind you all you all are in the majority you know. Women are in the majority.

I know you don't have maximum unity. I wish you did have among you. You could create the kind of a political change that might be helpful.

I just wanted to say that.

Mr. **Martinez**. Especially in the administration.

Thank you, Mr. Hayes.

Mr. Waldon.

Mr. **Waldon**. Thank you very much, Mr. Chairman.

Ms. Greenberger made a statement which reminded me of a little story in regard to the standard. The applicable standard being implemented by the Justice Department is a stricter standard regarding males than females.

A parish priest was called to the emergency room in the hospital. One of his parishoners had died, and he was administering the last rites. The doctors miraculously revied the parishoner.

When he awoke, the parishoner told the priest I died and went to heaven and I saw God.

The priest in great excitement, said well describe him to me. Tell me about this great event that your experienced.

He said, well, first, He's not a He, and She's black.

So, I think you ought to go to the Justice Department and tell them that perhaps they're traveling along the wrong road.

In regard to the recent appointments of Justice Rehnquist and Mr. Scalia to the Supreme Court in their respective positions, are you apprehensive about the course that this Court will follow in future regarding women's rights?

Ms. **Greenberger**. Well, I'm not a pessimistic person. So, I preface my remarks by that.

I think, just in terms of the practicalities of the moment at least, given the separate opinions and positions that each of the Justices have taken so far, obviously Justice Rehnquist has already laid out his position as an opponent of affirmative action, and he remains on the Court as Chief Justice. And that, to me, is very troubling, not only because what I think it unfortunately says about our country to have that person as Chief Justice, but I do think that there are powers, such as the Chief Justice has, in terms of assigning opinions and the like, that can have an impact in the future.

The replacement, in practical terms, of a vote for Chief Justice Burger by now Justice Scalia also I don't think changes the balance with respect to these opinions on affirmative action, since the majority in favor of affirmative action did not include Chief Justice Burger.

In the short term, with respect to the Justices who are sitting on the Court and have laid out their positions, there is clearly still a majority, assuming that they hold to those positions, in favor of affirmative action.

I don't know what will happen if there is yet another appointment.

Obviously the Court is very closely divided on these issues. And that could make a very big difference.

It remains to be seen what happens when Justice Rehnquist is Chief Justice and what that does with respect to the tone and tenor of the Supreme Court.

But at least, certainly, for the moment, there are five Justices still on the Supreme Court who have clearly stated that they believe in affirmative action and support the principle.

Mr. **Waldon**. OK.

Ms. Withers, not only from the testimony we've heard this morning, but more from the feeling level from the very capable members of your panel, how do you feel this administration—let me reword that.

Has the posture of this administration, in your opinion, caused the forward movement of women's rights in this country to remain the same, move ahead, or has it, in fact, worsened in these 6 years or so?

Ms. **Withers**. Well, it's clear that it's not advanced. I don't know the statistics.

I would say that things have worsened in the sense that, while there have been some incremental advances in certain kinds of positions for women, as regards to affirmative action the overall feeling is that there's no one in Government that cares whether women, women of color, white women, other protected categories are indeed protected.

So, I would say that this administration has engendered a feeling of retrenchment, of turning back the clock, to use a term that we all use over and over again.

Mr. **Waldon**. Let me, just because of my ignorance, throw something out.

Is there any movement now for a national convention from all of the women's organizations to bring pressure to bear on this administration to turn it around regarding its archaic chauvinistic position?

Ms. **Krieter**. It's been going on since January 29, 1981, basically.

The one thing this administration has done, more so than any other administration, is formed a very cohesive coalition of women's civil rights, labor, and civic organizations in this country, who, in the past, kind of had a division of labor on issues, were not always unanimous in their stands on how to accomplish.

And this administration has united everyone in what the ends are and the fact that those ends are being eroded daily.

And there have been all sorts of gatherings, coalitions, meeting with the various Cabinet officials in charge of the various policies and, in fact, with the White House staff itself.

To the extent that we have held back the floodwaters, I think it is because of that concerned effort of all us, not in the hopes of making progress, but not to see all of our gains completely eroded before we somehow get rid of this administration.

Mr. **Waldon**. Thank you very much, Mr. Chairman.

Mr. **Martinez**. Thank you, Mr. Waldon.

At this particular time, without objection, I would like to enter into the record testimony on behalf of the Congressional Women's Caucus, submitted by Olympia Snowe.

[The prepared statement of Hon. Olympia J. Snowe follows:]

PREPARED STATEMENT OF HON. OLYMPIA J. SNOWE, A REPRESENTATIVE IN CONGRESS FROM MAINE

Mr. Chairman, on behalf of the Congressional Caucus on Women's Issues, I'd like to express my appreciation for holding this hearing on women in the workforce.

We are currently witnessing unprecedented growth in the numbers of women entering the work force. Nearly half of all workers today are women, up from 33% only 20 years ago. The majority of these female employees - 80% of whom earn less than $19,000 a year, mainly in service jobs - work out of economic necessity. By 1995, 80% of women aged 25 to 44 will be working, up from 50% in 1970. And 90% of them will be mothers. Clearly, these changing demographics will create a growing demand for adequate, quality childcare and reasonable employment policies.

Women also continue to make slow progress in the area of equal pay. Although the average female worker has 12.65 years of schooling, while males have 12.57, women's pay for a full-time work averages only $15,600 a year - compared with $24,200 for men. Today, the median income for women who work full-time, year round is 64% of the median income for men. This wage differential has remained virtually unchanged for decades. And as more low-paid women enter the economy, this gap may continue to widen.

I would like to specifically address the role affirmative action plays in breaking down employment barriers for women and minorities. Thanks to the affirmative action requirements for federal contractors, women were able to move into non-traditional, managerial, and skilled positions where they had never been allowed to set foot before. Women and minorities are now getting skilled, managerial, and better paying positions. Affirmative action mechanisms - including goals and time tables - have been in large part responsible for initiating these changes and overcoming job segregation and the wage gap.

But no one can say the job is now complete. Most women and minorites remain concentrated in low paying and low status occupations. Policies of affirmative action must continue to be closely adhered to if we expect to see further progress.

Last year I and my colleague, Rep. Schroeder, met with Assistant Attorney General William Bradford Reynolds, as co-chairs of the Congressional Caucus for Women's Issues, to express our concern over possible changes in the current affirmative action guidelines. We reiterated to him the same message we had sent to Attorney General Meese in an earlier letter: "the equal employment requirements put forward in Executive Order 11246 are a fair and just means for remedying centuries of discrimination." The goals and timetable technique has been supported by both those who have suffered from historical discrimination and many in the business community. The policy of establishing hiring goals and timetables for minorities and women has become an accepted management practice for businesses, and one with a proven track record of success.

I also think it is important to point out that in three cases this last term, the Supreme Court signaled its approval for race-based, or whole-class, affirmative action plans that are "narrowly tailored" to remedy the problem of prior discrimination. These rulings are in direct opposition to the view that only specific identified victims of discrimination may obtain Title VII relief, and that all numerical goals should be forbidden.

In Local 28 v. Equal Employment Opportunity Commission (Docket No. 84-1656) and Local Number 93 v. City of Cleveland (Docket No. 84-1999) the Court found both court-ordered and voluntarily-adopted race-conscious hiring goals appropriate remedies for proven past discrimination. Indeed, the Court wrote they may be the only "effective means available to ensure the full enjoyment of the rights protected by Title VII," which forbids discrimination on the basis of race, sex, national origin, religion, or age.

In the third affirmative action case, Wygant v. Jackson Board of Education (Docket No. 84-1340), the Court struck down a school boards lay-off plan in which white teachers had been let go before their senior black counterparts. The Court based its decision on the lack of evidence of past discrimination by the school board and the consequently "unjustifiable" impact on white displaced from their job. A majority of the Justices, nonetheless, drew a marked distinction between the imposition of layoffs versus hiring goals, expressing support for hiring preferences that do not unduly penalize other employees.

The effect of these rulings on Administration policy is already being felt. On July 23, the Equal Employment Opportunity Commission (EEOC) announced, in response to the Supreme Court's rulings, it would instruct its enforcement attorneys to "seek goals and timetables, and race- and sex-conscious remedies" for employers who discriminate. This is a direct turn around from EEOC's previous intention this year to abandon goals and timetables.

Additionally, Assistant Attorney General Reynolds, acknowledged immediately following the ruling that he would have to "go back and take a look" at letters he sent a year ago to 51 cities, counties, and states ordering them to modify existing affirmative action plans. It was announced on August 5, in fact, that the Department of Justice has dropped its suit against Indianapolis seeking to eliminate minority and female hiring quotas in the city police and fire departments.

The intent of the Court's rulings, threaded through all three cases, is a clear message that numerical goals and timetables applied to remedy a specific and proven problem of discrimination are constitutional. Fortunately, these three decisions were hailed not only by civil rights organizations, but by many in the business community and the National Association of Manufacturers, who view hiring goals as a good business practice in their efforts to integrate the workforce.

It is my hope that the positive trends over the last decade for women and minorites will continue. If we want to see progress, I believe we must work to maintain strong and enforceable equal opportunity laws. Despite all our current efforts, it may be years before women enjoy a role equal to that of men in the economy.

Mr. MARTINEZ. With that, I would thank you for joining us and accepting our invitation to testify. Your testimony, as usual, was right on target.

Thank you.

Ms. KRIETER. Thanks.

Mr. MARTINEZ. With that, I'd like to call up our last panel.

It consists of Sarah Burns, assistant director, Georgetown University Law Center, Sex Discrimination Clinic, on behalf of Working Women's Institute and the GULC Sex Discrimination Clinic; and Lorence Kessler, specialist in corporate equal employment issues, of McGuiness & Williams.

I would again remind the witnesses that your written testimony is entered into the record in its entirety. And we would ask you to summarize and highlight your testimony.

With that, we'll begin with Ms. Burns.

STATEMENTS OF SARAH BURNS, ASSISTANT DIRECTOR, GEORGETOWN UNIVERSITY LAW CENTER, SEX DISCRIMINATION CLINIC ON BEHALF OF WORKING WOMEN'S INSTITUTE AND GULC SEX DISCRIMINATION CLINIC; AND LORENCE KESSLER, SPECIALIST IN CORPORATE EQUAL EMPLOYMENT ISSUES, McGUINESS & WILLIAMS

STATEMENT OF SARAH BURNS

Ms. BURNS. Thank you, Congressman Martinez. Good morning, Congressman Hayes.

We are, indeed, delighted to be here.

I am Sarah Burns, assistant director of the Georgetown University Law Center Sex Discrimination Clinic.

I am here on behalf both of the clinic and the Working Women's Institute.

The Working Women's Institute was founded in 1975 to serve as a national research, training, and consultation center, focussing specifically on the problem of sexual harassments faced by working women.

The institute has done groundbreaking research on the extent of sexual harassment in employment and its impact on women's employment opportunities, job performance, and health.

The Sex Discrimination Clinic is a teaching law clinic affiliated with the Georgetown University Law Center. It was founded in 1979.

We litigate sex discrimination claims on behalf of plaintiffs in local and Federal agencies and courts. Many of our sex discrimination cases involve claims of sexual harassment.

The term sexual harassment encompasses a broad range of unwelcome acts that focus on women's sexuality rather than on their contributions as employees in the job side.

These acts may be visual. They may be verbal or they may be physical.

Under the equal employment opportunity guidelines, which are probably the best working definition of sexual harassment, sexual harassment is defined in this manner, as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

Such acts will constitute harassment if one of three conditions attaches.

First, submission to such conduct is made either explicity or implicitly a term or condition of the individual's employment.

Second, submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual.

Or, third, such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment is one of the most widespread problems that women face in the work force.

Studies have found that from 40 to 90 percent of all working women in America have experienced one or more forms of unwanted sexual harassment. And, indeed, every study, every study that has addressed the problem of the incidence of sexual harassment in the workplace, has found that at a minimum 40 percent of all working women have suffered from sexual harassment.

Women are subject to sexual harassment regardless of their age, their marital status, the type of job that they do, or whether or not they are pregnant.

Sexual harassment is not a recent phenomena. But we have recognized it as a legal harm only recently I think for two reasons. First, because we have really only recently taken seriously the issue of civil rights. And, second, because we have really only recently understood the stress effects that injustice and mistreatment have and the impact that those stress effects on our home life, our job performance, our health, and our life span.

Women's lower status in the work force hierarchy and women's marginal status in traditionally male occupations leave women more than men vulnerable to sexual harassment.

Women are concentrated in low echelon, low paying jobs, primarily in the clerical and service areas. In these traditionally female occupations, women are usually subordinate to male supervisors.

Moreover, even as the door of advancement has opened to women, women who enter predominately male occupations have been been greeted with hostility and resentment, which finds it expression both through sexual stereotyping and sexual harassment.

And, indeed, Mr. Chairman, the evidence strongly suggests that we will have to look to affirmative action if we are going to cure the problems of sexual harassment that are so widespread in traditional male jobs.

Black women and women who are members of other minority groups may be especially vulnerable to sexual harassment if they are in the inferior economic position to which we have historically assigned black and minority women.

Black women often are the sole supports of their families. They have a lower median salary than white women and men of any race.

In addition, one of the many unfortunate legacies of slavery is the stereotype of black women as being sexually available.

A study in 1985, commissioned by the Federal Aviation Administration, found that black, Hispanic, and other minority women suffer more sexual harassment than white women.

A study in 1982 of sexual harassment in the automobile industry found that black women not only were more frequently harassed than white women, but also were harassed more severely.

Sexual harassment, then, is a substantial barrier to equal employment opportunities for women.

A recent study reported in the American Journal of Orthophysiatry concerning the stress effects on sexually harassed women found that more than a quarter had been fired and another quarter had resigned because of sexual harassment.

These women not only lose their jobs, but because of their job turnover they are frequently relegated to low paying jobs at the bottom of the seniority ladder.

Many women suffer other adverse job consequences because of sexual harassment, including negative job evaluations, poor recommendations, denial of overtime, demotions, reassignments to less desirable shifts, hours, or locations, loss of job training, and being subjected to impossible performance standards.

Sexual harassment contributes to absenteeism. It distracts a worker from her job. It impairs her emotional and physical condition.

Members of the committee, some women who have no ready job alternatives and whose family rely heavily on their income may accede to unwanted sexual demands for sexual favors in order to keep those jobs. And for those women the consequences for them and for their families are, indeed, profound.

Fortunately, the Supreme Court decided in *Meritor Savings Bank* v. *Vinson* that sexual harassment is sex discrimination under title 7.

The Supreme Court also said that the Court should look to legal standards concerning agency principles for guidance to determine whether a corporation is liable for its employees' sexual harassment.

Now, while this standard is not as stringent as the standard of strict liability, which was endorsed by the U.S. Court of Appeals for the District of Columbia in the case of *Vinson* v. *Taylor,* the predecessor to *Meritor Savings Bank* v. *Vinson,* it is a strong standard.

I would note that the standard of strict liability was the standard adopted in the EEOC guidelines concerning sexual harassment.

And it was only with this administration that the Equal Employment Opportunity Commission backed off from the standard of strict liability for supervisors' harassment of working women, and endorsed, instead, the standard of agency principle.

And I believe that it is because the EEOC and the Government backed off of that strict liability standard that the Supreme Court found that the agency principles would apply in the case, even of a supervisor's harassment.

I do believe, however, that the agency standard is still a very high standard, and that most corporations in most instances will, in fact, be liable for the harassing acts by supervisors and coworkers of female employees.

The Supreme Court was clear that absence of notice by the employee to the employer concerning the sexual harassment would not necessarily insulate the employer, nor would the mere existence of a grievance procedure and a policy against discrimination.

Perhaps a procedure well calculated to encourage victims of harassment to come forward, the Supreme Court suggested, might help a corporate employer to avoid liability.

But, essentially, it will be left to the Federal courts to determine on the facts of each case whether a sexually harassing employee was, at the time of harassment, an agent of the company.

The concurring opinions in *Vinson,* as well as the body of Federal law concerning agency and apparent authority, suggest that under most circumstances sexually harassing supervisors and sexually harassing coworkers, where their acts are known to their employer, will, in fact, be an employer's agent, such that the company will be liable to sexual harassment under title 7.

Meritor Savings Bank v. *Vinson* is a victory for all workers.

But the fight to stop sexual harassment has just begun. We need vigorous Federal oversight and enforcement.

No woman, particularly not a woman who is suffering from sexual harassment, can fight the battle for us.

Congress and the executive branch must give strong backing to law enforcement in this area. And the Federal courts must vigorously enforce remedies for sexual harassment if we are to cure the problem.

Thank you.

Mr. MARTINEZ. Thank you, Ms. Burns.

[The prepared statement of Sarah E. Burns follows:]

PREPARED STATEMENT OF SARAH E. BURNS, ASSISTANT DIRECTOR, GEORGETOWN UNIVERSITY LAW CENTER, SEX DISCRIMINATION CLINIC

Good morning, Mr Chairman. I am Sarah E. Burns, Assistant Director of the Georgetown University Law Center Sex Discrimination Clinic. I am here on behalf of the Clinic and the Working Women's Institute to talk about sexual harassment.[1]

The Working Women's Institute, Mr. Chairman, is a New York not-for-profit corporation, founded in 1975 to serve as a national research, training and consultation center, focusing specifically on the problem of sexual harassment faced by working women. The Institute has done ground-breaking research on the extent of sexual harassment in employment and its impact on women's employment opportunities, job performance and health. You will hear some of the results of their research today. A leader in the fight against sexual harassment, it is the only national organization with a complete program devoted to investigating and developing ways to overcome the problem of sexual harassment. The Institute's Director K.C. Wagner was unable to join us from New York, Mr. Chairman, and has asked me to present this testimony on behalf of the Institute.

The Sex Discrimination Clinic is a teaching law clinic affiliated with the Georgetown University Law Center. We litigate sex discrimination claims on behalf of plaintiffs in local and federal agencies and courts. We also represent sufferers of domestic violence seeking remedies to that violence in the District of Columbia Courts. Many of our sex discrimination cases involve claims of sexual harassment, or the maintenance of a sexually discriminatory working environment, which is one type of sexual harassment case.

We have been asked to testify generally about sexual harassment in employment and specifically on the recent U.S. Supreme Court decision, Meritor Savings Bank v. Vinson, 45 U.S.L.W. ________ (decided June 19, 1986). As this Committee no doubt knows, Meritor Savings Bank v. Vinson was the first case in which the Supreme Court has ever considered the question of sexual harassment and whether it is proscribed under Title VII of the Civil Rights Act of 1964. Drawing from the vast body of research that the Working Women's Institute and others have assembled, I will first address generally the extent and nature of sexual harassment and its harms. I will then turn to the case of Meritor Savings Bank v. Vinson.

Defining Sexual Harassment: Sexual Harassment First and Foremost Is Unwelcome Conduct

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[1] The Working Women's Institute and the GULC Sex Discrimination Clinic acknowledge and thank attorneys Laurie E. Foster and Ellen M. Saideman of Lord, Day & Lord, New York, New York, for their substantial contribution to this testimony.

The term "sexual harassment" encompasses a broad range of unwelcome acts that focus on women's sexuality, rather than on their contributions as employees.[2] These acts may be visual (leering and ogling), verbal (derogatory remarks, innuendos and jokes) or physical (pinching, fondling and rape). Sexual harassment also includes requests for sexual relations combined with explicit or implicit threats of adverse job consequences if the woman refuses. Under the Equal Employment Opportunity Commission ("EEOC") Guidelines:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a) (1985).

This is probably the best definition of sexual harassment. It makes clear that sexual harassment encompasses acts that cause subtle psychological coercion and acts of gross physical abuse.

Sexual activity may be socially acceptable and wholly unrelated to the job. At issue in the sexual harassment context, however, is not "sexual activity" itself but rather the act of making a worker an object of unwanted sexual activity with the result of interfering with her job, the benefits that she obtains from her job or her ability to perform her job. By definition, sexual harassment is unwelcome sexual attention and therefore excludes sexual attention that is welcome and not intimidating or coercive in any way.

There is widespread agreement as to that constitutes sexual harassment, a 1981 survey of executives by the Harvard Business Review in conjunction with Redbook Magazine has concluded. Collins & Blodgett, *Sexual harassment... some see it... some won't...*, 59 Harv. Bus. Rev. 76, 78 (1981) (hereinafter "Collins"). *See also* Safran, *Sexual Harassment: The View from the Top*, 156 Redbook 46 (Mar. 1981) (hereinafter "Safran"). A 1981 study by the U.S. Merit Systems Protection Board surveying federal employees found that pressure for sexual relations, sexual letters and calls, and deliberate touching were widely recognized as sexual harassment, whether or not the harasser was a supervisor.[3] The majority of respondents to that Merit System study also thought that suggestive looks and sexual remarks from a supervisor were sexually harassing, and the majority of the female respondents considered such conduct sexually harassing regardless of the harasser's rank. U.S. Merit Study, *supra* n.7, at 27.

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[2] Sexual harassment also includes harassment, not sexual in nature, that would not occur but for the sex of the employee. McKinney v. Dole., 765 F.2d 1129, 1138 (D.C. Cir. 1985).

The Extent and Nature of Sexual Harassment

Sexual harassment in employment is a widespread phenomenon; it can affect virtually any female worker and may affect male workers as well. It has already seriously affected the employment of many women in this country. It is important for members of this Subcommittee on Employment Opportunities to comprehend fully the extent and nature of sexual harassment. Accordingly, I am going to draw from employment-related social science studies. The findings of these studies are borne out in the facts of the many sexual harassment cases that the federal courts have seen in the last 10 years.

As reported in the first major survey concerning sexual harassment, a 1976 Redbook Study of 9000 Women, the vast majority of women found unwelcome sexual attention humiliating, demeaning, and intimidating.[4] The federal employees surveyed in the Merit System Study almost unanimously agreed that unwanted sexual attention on the job is something employees should not have to tolerate.

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[3] *Sexual Harassment in the Federal Workplace*, Report of the U.S. Merit Systems Protection Board 26-27 (1981) (hereinafter "U.S. Merit Study"). In March 1981, the Merit System Protection Board presented a report on a survey about sexual harassment in the federal workplace. Over 20,000 federal employees had completed the survey, making it the largest and most comprehensive study to date. *Id*. at iii, v. The majority of respondents who had also worked outside the federal government believed that sexual harassment was no worse in the federal workplace than in the private sector or state and local governments. *Id*. at 39.

[4] Safran, *What Men Do To Women On the Job*, 148 Redbook 149, 217 (Nov. 1976)(hereinafter "Redbook Study") was the first major survey of sexual harassment.

Sexual harassment is usually not an isolated incident. The U.S. Merit Study found that most incidents were repeated, and lasted for a week or more, and many lasted more than six months. *See*, *e.g.*, *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780, 785 (E.D. Wisc. 1984)(harassment lasted more than three years). U.S. Merit Study, *supra* n.7, at 38-39. Even a single incident, if severe enough to have work-related repercussions, may constitute sexual harassment. For example, rape is sexual harassment, and actual or attempted rape is the one form of sexual harassment that commonly occurs only once. *Id.* at 38.

Sexual harassment may affect one women, several women or all the women in a particular workplace, but frequently more than one woman is harassed.[5] *See, e.g. Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 940, n.3 (D.C. Cir. 1981); *Horn v. Duke Homes*, 755 F.2d 599, 602 (7th Cir. 1985). That a harasser often bothers more than one particular woman negates the view that sexual harassment is mainly a matter of sexual attraction to a specific person and instead demonstrates that it is gender-related. U.S. Merit Study, *supra* n.3, at 10.

1. Sexual Harassment of Women Is Pervasive

Sexual harassment is one of the most widespread problems women face in the workforce.[6] Studies have found that from 40-90% of American women have experienced one or more forms of unwanted sexual attention on the job. The Redbook study found that 88% of the respondents had experienced sexual harassment. Redbook Study, *supra* n.4, at 219. The U.S. Merit Study, *supra* n.3, at 5, found that 42% of female federal employees had experienced sexual harassment in the two years prior to the survey. Most recently, a study of the Eastern Region of the Federal Aviation Administration (FAA), performed under contract to FAA, found that 40% of the female employees had experienced sexual harassment and 66% had experienced either gender bias or sexual harassment. Working Women's Institute, *Results of a Survey on Gender Bias and Sexual Harassment in the FAA Eastern Region*, 7, Addendum at 1 (August 1985)(hereinafter "FAA Study").

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[5] The U.S. Merit Study, *supra* n.3, at 60, found that 43% of the female victims reported that their harassers had bothered others (53% did not know), and often the harassers responsible for the more severe harassment were repeat offenders.

[6] *Sex Discrimination in the Workplace: Hearings Before the Senate Labor and Human Resources Comm.*, 97th Cong., 1st Sess., 518 (1981)(hereinafter "Senate Hearings")(Statement of Karen Sauvigne and Joan Vermeulen of Working Women's Institute).

Women are subject to sexual harassment regardless of their age. *E.g.*, *Horn*, 755 F.2d at 601 (47 years old); *Robson v. Eva's Super Market, Inc.*, 538 F.Supp. 857, 859 (N.D. Ohio 1982)(19 years old). One study found that victims ranged in age from 16 to 65. Crull, The Impact of Sexual Harassment on the Job in *Sexuality in Organizations* 67 (1980)(hereinafter "Crull"). Women are also subject to sexual harassment regardless of their marital status,[7] *e.g.*, *Phillips*, 711 F.2d at 1527 (married); whether they are blue collar workers, e.g., *Craig v. Y & Y Snacks, Inc*. 721 F.2d 77, 78 (3d Cir. 1983)(assembly-line worker), clerical workers, *Stewart v. Thomas*, 538 F.Supp. 891, 893 (D.D.C. 1982)(legal clerk), or professionals, *e.g.*, *Kyriazi v. Western Electric Co*., 461 F.Supp. 894, 899 (D. N.J. 1978)(engineer). *See also Woerner v. Brzeczek*, 519 F.Supp. 517, 518 (N.D. Ill. 1981)(police officer). Even pregnant women have been sexually harassed, *e.g.*, *Zabkowicz*, 589 F.Supp. at 784. In sum, any woman may be a target of sexual harassment.

The most common form of sexual harassment is verbal, including repeated comments about a woman's body, sexual jokes, sexual innuendos and sexual propositions. FAA Study, *supra* p.6, at 7. One study found that a third of the female employees had been subjected to sexual remarks, a quarter had been deliberately touched, fifteen percent had been pressured for dates, nine percent had been pressured for sexual relations, and one percent had been subjected to actual or attempted rape or assault.[8]

Sexual harassment is not a recent phenomenon. Women have been sexually harassed as long as they have been employed outside their own home.[9] With the advent of the industrial revolution, vast numbers of women went to work in factories and confronted extensive sexual harassment.[10] Sexual harassment, then as now, went hand in hand with other forms of discrimination against women, but the extent to which sexual harassment circumscribes women's employment opportunities has been understood only recently. Farley, supra n.10, at 12.

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[7] Frequently, sexual harassment of a single employee continues or even intensifies after she marries. *See*, *e.g*. *Mays v. Williamson and Sons*, 591 F.Supp. 1518, 1520 (E.D. Ark. 1984), *aff'd*, 775 F.2d 258 (8th Cir. 1985).

[8] The U.S. Merit Study, *supra* n.3, at 37. The U.S. Merit Study estimated that found 264,000 women had been sexually harassed in the federal work force over a two year period. According to its results, projecting the survey results to the entire federal workforce, approximately 9,000 female federal employees were the victims of actual or attempted rape or assault over a two-year period. U.S. Merit Study, *supra* n.3, at 35-37.

2. Women Are Especially Vulnerable to Sexual Harassment

Although sexual harassment is not, by definition, limited to women, women are substantially more likely to be sexually harassed than men. The U.S. Merit Study, supra n. 3, at 36, found that women were three times more likely to be sexually harassed than men (42% of the female employees compared to 15% of the male employees). Applying these figures to the entire federal workforce, approximately 294,000 women and 168,000 men were harassed over a two year period. Id. See also FAA Study, supra, Addendum at 5, 9.

At the risk of oversimplifying, women are more vulnerable to sexual harassment for several reasons: first, social norms approve male control over women; second, the social norms reinforce women's acceptance of that control; and third, and more importantly for our purposes, women's lower status in the workforce hierarchy and marginal status in traditionally "male" occupations leave more women than men vulnerable to sexual harassment. Women are concentrated in low echelon, low-paying jobs, primarily in the clerical and service areas.[11] In these traditionally female occupations, women are usually subordinate to male supervisors. For example, women are 80.5% of the clerical workers whereas men are 72.5% of the managers and administrators. Time of Change, supra n.11, at 58-59. Women's raises and opportunities for advancement often depend on the goodwill of their supervisors, and not

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[9] Louisa May Alcott, later author of Little Women, described in an 1874 newspaper article her experience when she went to work as a domestic servant at the age of eighteen. Her employer harassed her and when she rebuffed his advances, he retaliated by giving her more difficult work until she quit. Alcott, How I Went Out To Service, 26 The Independent (June 4, 1874).

[10] Farley, Sexual Shakedown 34-36 (1978) (hereinafter "Farley").

[11] Women's Bureau, U.S. Dept. of Labor, Time of Change: 1983 Handbook on Women Workers 51, 92 (1983) (hereinafter "Time of Change").

necessarily on their job performance. Kanter, *Men and Women of the Corporation* 77 (1977).

Even as the door of advancement has opened to women, women who enter predominantly male occupations have often been greeted with hostility and resentment[12] that finds expression through sex stereotyping and sexual harassment. Through sexual harassment, male co-workers and supervisors try to show that women do not belong in what had previously been an all-male "Club." Gruber, *supra* n.12, at 272; Cohen *supra* n.12, at 143. Accordingly, any woman in a predominately male job category is even more likely to be sexually harassed than a woman in traditionally female positions. U.S. Merit Study, *supra* n.3, at 6, 8, 54; FAA Study, *supra*, at 12, 51. In sum, now that the law forbids employers to advertise that "women need not apply" for jobs historically filled by men, sexual harassment has become the bar to women's entry into and success in these often better-paying jobs.

The hierarchical structure of the workplace puts men in positions of power vis-a-vis women. The supervisor's role affords him tremendous opportunity for exerting undue influence on subordinates. The Harvard Business Review Study reported that because of the supervisor's power, the same behavior is more threatening and serious when the harasser is a supervisor rather than a co-worker. Collins, *supra*, at 80. The U.S. Merit Study agreed. *See* U.S. Merit Study, *supra* n.3, at 4. Women who were harassed by supervisors are also more likely to foresee *and* to suffer negative consequences for refusing to submit than those harassed by co-workers or other employees. U.S. Merit Study, *supra* n.3, at 11; Cohen, *supra* n.12, at 144.

Because of his authority, the supervisor is responsible for the tone of the working environment. U.S. Merit Study, *supra* n.3, at 61. Frequently, supervisors who are aware of sexual harassment treat it as insignificant or tacitly encourage it.[13] Whatever his authority to make final decisions as to promotion or dismissal,[14] the supervisor is in the most

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[12] Wider Opportunities for Women, *A Territorial Issue: A Study of Women in the Construction Trades* 39-40 (1982); Crull & Cohen, *Expanding the Sexual Definition of Harassment*, Occupational Health Nursing 141, 143 (Mar. 1984) (hereinafter "Cohen"); Gruber & Bjorn, *Blue Collar Blues: The Sexual Harassment of Women Auto Workers*, 9 Work & Occupations 271, 272 (August 1982) (hereinafter "Gruber").

[13] Supervisors are more likely to tolerate sexual harassment of subordinates of the opposite sex. U.S. Merit Study, *supra* n.3, at 51; Cohen, *supra* n.12, at 142.

[14] Even where a supervisor does not have final authority to

(Footnote continued)

immediate position to assign and evaluate work and therefore has the ability to make an employee's life tolerable or intolerable and work successful or unsuccessful.

Co-workers, subordinates, and customers may also sexually harass women workers which could result in violation of Title VII if their behavior creates job-related reprisals or intolerable working conditions. *See McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984); *EEOC v. Sage Realty Co.*, 507 F. Supp. 599 (S.D.N.Y. 1981). A supervisor who stands by and lets other supervisors, co-employees or customers harass female workers is setting up an employment horse race in which the female worker must perform under a much heavier burden than her male counterparts. The result may be that even an outstanding woman, laboring under the uniquely difficult burdens placed on women only, will appear in actual job output to be no better than her more average peers, for example. An average female worker will appear to be less productive or successful than her male counterpart. The result, even with an otherwise fair supervisor (who does not engage in sexual harassment), is that the woman will probably be slowed or lose out in getting the advancement she deserves.

Many women are vulnerable to sexual harassment because of their economic position. Due to the historical sex segregation of the workforce and the exclusion of women from higher-paying positions, women earn 63 cents for each $1.00 earned by men.[15] We as a country can no longer assert that women can afford this lower pay because of the stereotype that women can fall back on their husbands. In 1984, two-thirds of the women in the civilian labor force were either single (26%), divorced (11%), widowed (5%), separated (4%), or had husbands whose incomes were less than $15,000 (19%). 20 Facts, *supra* n.15, at 2. In 1984, women maintained more than ten million families with children, 17% of all such families. *Id.* at 4. Married women who worked full-time contributed 38% of the family income on average, and 69% where the family income was under $10,000. Time of Change, *supra* n.11, at 19. In sum, women work for the same reasons men work, to support their families, but have to make do with substantially lower wages.

The women most likely to be sexually harassed are

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make promotions or dismissals, his influence on an employee's future through his recommendations may be absolute absent objective standards for promotion or evaluation. Vermeulen, *Employer Liability under Title VII for Sexual Harassment By Supervising Employees*, 10 Cap. U.L. Rev. 499, 506 (1981).

[15] Women's Bureau, U.S. Dept. of Labor, *20 Facts on Women Workers* 3 (1984) (hereinafter "20 Facts").

women who are economically vulnerable. Extensive sociological research has found that most victims of sexual harassment are very dependent on their jobs. In the U.S. Merit Study, 69% of the female victims reported that they needed their jobs "a great deal." U.S. Merit Study, *supra* n.3, at 46 & 67-68. For example, in one case, *Phillips*, 711 F.2d at 1532, the employer tried to use his knowledge of the plaintiff's economic vulnerability to persuade her to perform sexual acts. When she refused, he fired her, and her family lost their house.

Black women and women who are members of other minority groups may be targeted for sexual harassment, especially if they are in the inferior economic position to which we have historically assigned black and minority women. Black women, often the sole support of their families, have a lower median salary than white women and men of any race. 20 Facts, *supra* n. 15, at 3, 4. In addition, one of the many unfortunate legacies of slavery, where black women were considered the property of white men and were sexually exploited, is the stereotype of black women as sexually available, sexually promiscuous, and unprotected by black men.[16]

The FAA study found that Black, Hispanic, and other minority women suffer more sexual harassment than white women. FAA Study, *supra*, at 48.[17] A study of sexual harassment in the automobile industry in 1982 found that black women not only were harasssed more frequently than white women, but also were harassed more severely. Gruber, *supra* n.12, at 284-85. *See also, Munford v. James T. Barnes & Co.,* 441 F. Supp. 459 (E.D. Mich. 1977). *See generally, When the Boss Wants Sex*, Essence, 82 (Mar. 1981).

Women are also vulnerable to sexual harassment because of their socialization. In U.S. society despite recent changes in social custom, men are usually the initiators of purely social interaction between members of opposite sexes and women the recipients.[18] That men, rather than women, generally initiate sexual relationships ensures that women bear the brunt of job-related advances. Women's socialization combined with economic subservience leaves many women without any sense that they have options for stopping harassment.

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[16] Ellis, *Sexual Harassment and Race* 8 J. Legis. 30, 39-40 (1981). Black women are also harassed by black men in part because attitudes toward black women in the culture as a whole have been shaped by those of the dominant group, white men. *Id.* at n.46. The fact that other members of the protected group join in the harassment does not make the harassment any less illegal. *See EEOC Decision No. CL 68-12-431 EU,* 2 Fair Empl. Prac. Cases (BNA) 295 (1971)

[17] There are frequently racial overtones to the sexual harassment of black women. Ellis, *supra* n.16, at 33. For example, in *Miller v. Bank of America*, 600 F.2d 211, 212 (9th Cir. 1979), a black woman alleged that she was fired because she refused her supervisor's demand for sexual favors from a "black chick."

As a result, many women respond to sexual harassment by ignoring it, but this tactic usually does not work. The U.S. Merity Study found that 61% of the women ignored the behavior, and that this was one of the least effective responses. U.S. Merit Study, *supra* n.3, at 67. *See also* Redbook Study, *supra* n.4, at 218. According to the Redbook Study, the overwhelming majority feel helpless when confronted with sexual harassment. Redbook Study, *supra* n.4, at 218. Many victims are unaware of any formal remedies. U.S. Merit Study, *supra* n.3, at 88. Many are afraid that if they complain they will be blamed or told that the problem is trivial.[19] Only one in four expect that if they complain, the harasser would be asked to stop. According to the Redbook Study, *supra* n.4, at 218, these expectations have unfortunately conformed with reality. The U.S. Merit System Study found that half of the women who complained found their protest had no effect or aggravated the harassment. U.S. Merit Study, *supra* n.3, at 11. We can only hope that the recent Supreme Court decision and the publicity surrounding it has signaled to employees and employers alike that sexual harassment will not be tolerated.

The cases prior to *Vinson* confirm that complaining about sexual harassment has often been futile and may even worsen the problem. *See, e.g., Bundy v. Jackson*, 641 F.2d 934, 940 (D.C. Cir. 1981)(when plaintiff, who was harassed by her supervisors, complained to their supervisor, he told her "that any man in his right mind would want to rape you" and asked her to begin a sexual relationship with him). *See also Katz v. Dole*, 709 F.2d 251, 253-54 (4th Cir. 1983). The perception that a harasser in a supervisory position will not be prevented by the employer from abusing his authority to extract sexual favors can lead a victim who has no economic options to submit for fear of losing her job.

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[18] Crull, *The Stress Effects of Sexual Harassment on the Job*, 52 Am. J. Orthopsychiatry 539, 542 (1982) (hereinafter "Stress Study"); Taub, *Keeping Women in Their Place: Sex Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345, 367 (1980).

[19] Renick, *Sexual Harassment at Work*, Personnel J., 658, 660 (1980) (hereinafter "Renick").

Sexual Harassment Impairs Women's Employment Opportunities and Harms Their Physical and Psychological Health

As a result, sexual harassment is a substantial barrier to equal employment opportunity for women. Many women lose their jobs and their livelihood when they refuse to accede to sexual advances, and many others resign rather than remain in workplaces rendered intolerable by sexual harassment. A recent study reported in the American Journal of Orthopsychiatry concerning the stress effects on sexually harassed women found that more than a quarter had been fired and another quarter had resigned because of sexual harassment. Stress Study, supra n.18, at 541. As reported in Senate hearings, Senator Paula Hawkins quit her first secretarial job, because, in her words, "the boss continued to pinch me and I did not like it." Senate Hearings, supra n.6, at 8. The U.S. Merit Study, supra, n.3, at 76, estimated that 24,660 female federal employees, left their jobs because of sexual harassment over the two year study period. See, e.g., Mays v. Williamson & Sons, 775 F.2d 258 (8th Cir. 1985) (janitor fired after she refused supervisor's sexual advances and filing complaint of sex discrimination with the EEOC); Horn, 755 F.2d at 599 (factory worker fired after refusing to respond to sexual advances by her supervisor); Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984) (woman constructively discharged by employer's tolerance of sexually harassing conduct). Of course, many women cannot afford to quit or be fired. They may accede - and suffer even more profound personal costs.

Women who are fired or resign in the face of persistent sexual harassment not only lose their jobs, but, because of their job turnover, they are frequently relegated to low paying jobs at the bottom of the seniority ladder. Farley, supra n.10, at 23-25 . Thus, sexual harassment is a significant reason why women as a class have a shorter tenure on the job which, in turn, substantially contributes to the wage gap between men and women.[20]

Many women suffer other adverse job consequences because of sexual harassment, including negative job evaluations, poor recommendations, denial of overtime, demotions, reassignments to less desirable shifts, hours or locations, loss of job training and being subjected to impossible performance standards. Stress Study, supra n.18, at

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[20] According to the U.S. Dept. of Labor, 12% of the wage gap between white men and white women is attributable to the difference in length of employment with the present employer and 10% is attributable to years of training completed in the present job. Time of Change, supra n.11, at 90.

540-41.

Since one sure way to avoid sexual harassment is not to come to work, sexual harassment contributes to absenteeism. The FAA study found that twenty-one percent of the victims said it affected their attendance at work. FAA Study, *supra*, at 13. *See, e.g., Coley v. Consolidated Rail Corp.*, 561 F. Supp. 645, 647 (E.D. Mich. 1982) (female employee was so frightened by supervisor's threat that if she did not "do something nice for him" he would "start to get mean," that she simply did not report for work).

Furthermore, sexual harassment affects women's job performance. Many women subjected to persistent sexual harassment find it difficult to concentrate on their work and often devote time and energy that could be devoted to their duties to avoiding their harassers. Stress Study, *supra* n.18, at 541. Moreover, an employee's self-esteem and her ability to perform her job successfully are undermined when supervisors, co-workers and subordinates view her as a sexual object rather than a worker. *Id.* The FAA Study, *supra*, at 13, found that nearly one-third of women who were sexually harassed reported that the quality of their work suffered and nearly one-fifth found that the quantity of work they did declined.

Sexual harassment harms women's physical and mental health. The FAA Study, in 1985, found that nearly a quarter of sexually harassed women said that their experience affected their physical condition, and seventy percent said it affected their emotional condition. *Id.* at 13. The Stress Study of sexually harassed women found that ninety percent reported psychological stress, including nervousness, fear and anger, as many as sixty percent suffered from physical symptoms, including headaches, nausea and exhaustion, and twelve percent sought therapeutic help.[21] Stress Study, *supra* n.18, at 541. *See also* Cohen, *supra* n.12, at 145; Renick, *supra* n.19, at 660. *See Zabkowicz*, 589 F. Supp. at 783 (harassment caused "psychophysiological gastro intestinal disease," including diarrhea, vomiting and nausea); *Coley*, 561 F. Supp. at 648 (female employee was seriously psychologically affected by sexual harassment). *See also Weiss v. United States*, 595 F. Supp. 1050, 1055 (E.D. Va. 1984). In the recent case before the Supreme Court, the plaintiff, Ms. Mechelle Vinson testified that, as a result of Sidney Taylor's harassment, she suffered extreme physical and emotional stress which manifested itself in insomnia, nervousness and hair loss.[22]

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[21] In at least one reported case, sexual harassment caused a female employee to contemplate suicide. *Phillips*, 711 F.2d at 1528.

[22] Testimony of M. Vinson, Tr. Jan. 23, 1980, at 51, in
(Footnote continued)

Faced with threats of losing their economic livelihood, some women, may accede to sexual advances they find repellent or would otherwise reject. An unofficial poll of employees of the U.S. Department of Housing and Urban Development ("HUD") found that three out of ten sexually harassed women submitted to the sexual demands. *Sexual Harassment Rampant at HUD*, 7 Impact 1, 1 (July/Aug. 1979). In many cases, the sexual harasser is not someone the victim would choose as a partner. Redbook Study, *supra* n.4 at 217. Often, the harasser is married. U.S. Merit Study, *supra* n.3, at 58. In such cases, the stress effects on the harassed woman are compounded. Moreover, the message to other women in the workplace is that their value is not in their job performance but in their use as sexual objects. One study found that more than 90% of employees think that morale at work suffers when some employees appear to get ahead because of their sexuality. U.S. Merit Study, *supra* n.3, at 29. Sexual harassment thus harms not only its direct object but also her colleagues.

The United States Supreme Court Decision in *Meritor Savings Bank v. Vinson*

Although sexual harassment has been considered sex discrimination under federal law for approximately 10 years, the first time that the U.S. Supreme Court considered the question was this year in *Meritor Savings Bank v. Vinson*. In the employment context, every U.S. Court of Appeals that had considered the question has held that sexual harassment constitutes sex discrimination under Title VII.[23] *Mays v. Williamson & Sons*, 775 F.2d 25, 260 (8th Cir. 1985); *Horn v. Duke Homes*, 755 F.2d 599, 603-05 (7th Cir. 1983); *Easter v. Jeep Corp.*, 750 F.2d 520, 523 (6th Cir. 1984); *Simmons v. Lyons*, 746 F.2d 265, 269-70 (5th Cir. 1984); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); *Henson v. City of Dundee*, 882 F.2d 897, 901-02 (11th Cir. 1982); *Miller v. Bank of America*, 600 F.2d 211, 222 (9th Cir. 1979); *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044, 1046 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983, 995 (D.C. Cir. 1977).

22(continued)
Meritor Savings Bank v. Vinson.

[23] Title VII, 42 U.S.C. § 2000e-2(a)(1), provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with regard to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . "

In Barnes, where the plaintiff alleged that her job was abolished because she repulsed her male supervisor's advances, the court found that she had stated a prima facie case of sex discrimination under the plain language of Title VII. The court said:

> It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job.
>
> * * *
>
> But for her womanhood, from aught that appears, [Barnes'] participation in sexual activity would never have been solicited . . . she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. 561 F.2d at 989-90.

Thus, the federal courts had recognized that sexual harassment is discrimination because of sex in violation of Title VII.

We hoped that the Supreme Court would agree with the lower federal courts that sexual harassment is Title VII sex discrimination. The Supreme Court, however, has in the past taken a position on sex discrimination contrary to the position taken by all the U.S. Courts of Appeals. Congress recognized this when it passed the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 codified in part at 42. U.S.C. § 2000e(k)(1982), to amend Title VII and thereby overrule the Supreme Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Accordingly, none of us who care about sexual harassment could rest easy until the Vinson case was decided. And indeed, Working Women's Institute, joined by other organizations concerned about the impact of sexual harassment on working women, submitted a brief of amici curiae on behalf of respondent describing the extent and nature of employment-related sexual harassment. The Sex Discrimination Clinic also joined in a brief of amici curiae on behalf of the respondent in Vinson and did substantial work to inform the Supreme Court concerning the odd procedural and factual history of the Vinson case.

The employer bank was the party who petitioned for writ of certiorari in Vinson. The bank raised three issues:

> First, whether maintenance of a discriminatory work environment absent a showing of particular economic losses to the employee could constitute sex

> discrimination under Title VII;
>
> Second, whether an employing company could be liable for the sexually harassing acts of a supervisory employee even where it did not know or could not have known of the supervisor's sexually harassing conduct; and
>
> Third, whether evidence concerning alleged sexual fantasies or provocative attire of the complaining employee are admissible.

The bank was challenging the decision of the U.S. Court of Appeals for the District of Columbia in favor of Mechelle Vinson, the plaintiff in the case.

To understand the Vinson decision it is useful to know the history. The trial court in Vinson excluded virtually all evidence from other of the bank's female employees concerning the supervisor's sexually harassing acts toward them. On the other hand, the trial court admitted the bank's proferred testimony concerning the plaintiff's alleged sexual fantasies and provocative attire. It then found against the plaintiff. The Circuit Court reversed and remanded that decision. The theory of the D.C. Circuit was that the trial court had erred when it failed to consider the question whether there was a sexually discriminatory work environment at the bank as required under the case of Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). In order to consider the question of a sexually discriminatory working environment, of course, the trial court would have had to admit the plaintiff's proffered testimony by other female employees concerning the supervisor's harassment of them. So the Circuit ordered retrial admitting that testimony. The Circuit Court also opined that the bank was strictly liable if indeed the supervisor maintained a discriminatory work environment. It also ruled that testimony concerning the plaintiff's alleged sexual fantasies and provocative dress was not admissible. See Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).[24]

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[24] Interestingly, in connection with the appeals the trial court granted permission for the plaintiff to proceed in forma pauperis but denied her motion for a transcript at government expense. The trial court reasoned that it "cannot find that this appeal presents a substantial question which requires a transcript to be furnished at taxpayers' expense." Vinson v. Taylor, 27 F.E.P. 948, 950 (D.D.C. 1980). The bank, which could afford a transcript if it wished, selected a few small portions from the 11 days of testimony - notably, for example, the cross-examination but not the direct or redirect testimony of the plaintiff. Thus, one of the most important cases bearing on women's rights to be heard before the United States (Footnote continued)

After the initial decision by the D.C. Circuit, the bank petitioned for rehearing *en banc* which was denied *per curiam*. *See Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985). But the Circuit's denial of rehearing drew a scathing dissent by Judge Bork joined by Reagan appointees Judges Starr and Scalia (now Justice Scalia), criticizing, among other things, the concepts of sexual harassment as sex discrimination and of employer liability for the harassment. *Id*.

Thus, when the Supreme Court granted *certiorari* on the case, we could only fear the worse. Fortunately, the Supreme Court decided in *Vinson* that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile and abusive work environment." 54 U.S.L.W. at ___. Moreover, the fact that the plaintiff may subsequently become involved in some sexual activity characterized as "voluntary" does not eliminate her claim of discrimination; "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'" at the outset. 54 U.S.L.W. at . The Court rendered this opinion (1) even though the trial judge had found hypothetically that if a sexual relationship occurred between the plaintiff and her supervisor, it was voluntary *and* (2) even though Judge Bork dissented from the denial of rehearing so strongly. We think this makes clear the Court's strong backing of sexual harassment as a basis for legal action under Title VII. The essentially unanimous decision of the Court on these points was no less than a resounding victory for women's rights.

The Supreme Court also concluded that the "debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case." 54 U.S.L.W. at . The Court noted that, at this stage, it was unknown as a matter of fact whether environmental harassment had occurred at the bank. Accordingly, any ruling on employer liability would be in the nature of an advisory opinion. The Supreme Court did provide some guidance on how the courts should assess employer liability, however. It noted that the courts should "look to agency principles for guidance." 54 U.S.L.W. at . "Absence of notice" would not necessarily insulate the employer nor would the "mere existence of a grievance procedure and a policy against discrimination." *Id*. Perhaps a procedure well "calculated to encourage victims of harassment to come forward" might help an employer. *Id*. But essentially, it will be left for the federal courts to determine on the facts of each case whether a sexually

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24(continued)
Supreme Court was considered with almost no transcript record. *See Meritor Savings Bank v. Vinson*, 54 U.S.L.W. ________ n.1 (June 19, 1986).

harassing supervisor or co-employee was, at the time of the harassment, an "agent" of the company. The concurring opinions in Vinson, as well as the body of federal law concerning the concepts of agency and apparent authority, suggest that under most circumstances sexually harassing supervisors will in fact be an employer's agent such that the company will be liable for the sexual harassment under Title VII.

The Supreme Court also decided that a plaintiff's sexual fantasies and dress could be relevant. 55 U.S.L.W. at . This unfortunately means that any woman complaining of sexual harassment faces a minitrial concerning her alleged sexual thoughts and concerning the question where her attire was provocative. Most employers can generate willing (although not necessarily truthful) witnesses to testify against the most demure woman that she articulated some sexual comment or that, in their opinion, she dressed "provocatively." On the other hand, whether the defendant's specific proferred evidence is indeed relevant is a matter to be determined by the trial judge in each case so the plaintiff may be able to persuade the trial judge to exclude such testimony.

Leaving aside the evidentiary issues, however, Meritor Savings Bank v. Vinson is a victory for all workers. It concludes that sexual harassment is Title VII sex discrimination. It also confirms that employers should take every reasonable step to prevent and stop sexual harassment because they very likely will be liable for it.

But the fight to stop sexual harassment has just begun. We need vigorous federal oversight and enforcement. No woman, particularly not a woman who is suffering from sexual harassment, can fight the battle for us. Congress and the Executive Branch must give strong backing to law enforcment in this area. The federal courts must vigorously enforce remedies for sexual harassment and maintain procedural support to facilitate lawsuits in this area of law.

Thank you.

Mr. **Martinez**. Mr. Kessler.

STATEMENT OF LORENCE KESSLER

Mr. **Kessler**. Thank you, Mr. Chairman, members of the committee.

My name is Lorence Kessler. I am a member of the law firm of McGuiness & Williams in Washington, DC, specializing in employment and labor law.

I appreciate the subcommittee's invitation to appear at these hearings to discuss what employers are doing to prevent sexual harassment in the workplace.

In my practice, I work with a variety of midsized and large employers on equal employment matters.

From this perspective, I have seen a strong commitment by these employers to assure that all employees understand, first, that sexual harassment is not condoned in the workplace, and, second, that any employee who has been the victim of unwelcome sexual advances should let the employer know.

The recent decision by the Supreme Court in *Vinson* has served to focus public attention on this issue.

From the legal standpoint, it has served an important purpose in the maturing of the issue.

The opinion by Mr. Justice Rehnquist clarified that the key inquiry in any sex harassment claim is whether the alleged advances were welcome or unwelcome.

And the Court wisely rejected the automatic liability standard which the lower court had applied.

In practical terms, employers can seek to prevent sexual harassment, but they cannot guarantee that unwanted sexual advances will never occur.

Employers can promise, however, that once they become aware of a sexual harassment problem they will act promptly and fairly to eliminate that problem.

The employers I work with generally have had policies and training programs to prevent sexual harassment for a number of years.

The increased attention which sexual harassment has been receiving lately has created an opportunity for these employers to reaffirm those policies.

But, for most employers in this group, the *Vinson* decision does not require any radical changes in the manner in which they have been dealing with the problems of sex harassment.

Today, the most successful formula for dealing with sexual harassment remains the same as it has been. That is education, education aimed at preventing harassment from becoming a problem in the first place.

Such programs take many forms. For example, training employees generally to increase their awareness on this issue; training for supervisory employees to explain the company's policy prohibiting sexual harassment and how supervisors are to respond when an employee comes to them with a complaint of harassment; training for supervisors in workplaces which traditionally have had very few female employees, and training those supervisors on how to deal with the problems and attitudes that can confront women employees who are now entering those traditionally male workplaces; training employees, particularly women employees, on how to respond to unwelcome advances.

In addition, most employers recognize that when sexual harassment does occur, effective internal complaint procedures can significantly increase the chance for prompt resolution of the problem.

Employers have found that some or all of the following elements are useful in internal complaint procedures.

Complaints may be made through any of several people, not simply the supervisor, thus assuring that the alleged harasser is not the employee's only channel for a complaint.

Those designated to receive complaints should be individuals with whom the employee will feel comfortable in discussing their problem and individuals who have been trained in dealing with complaints of sex harassment.

A telephone complaint line which can be used by employees who find it difficult to register this kind of a complaint in person and procedures to assure the confidentiality of any complaints as well as any information developed during the employer's investigation.

I am confident that employers will continue to make progress in sending out the message that sex harassment is not tolerated in the workplace.

On the other hand, this is not to say that the task of eliminating sexual harassment will be an easy one.

I have described several of the difficulties, some of the open legal questions, and some of the practical problems in my written statement.

But by raising these questions I do not mean to suggest that Congress needs to act in this area, nor am I suggesting that companies will be unable to deal with most situations of sex harassment.

The practical guidance contained in the *Vinson* decision appears to recognize that while courts stand ready to rule in sexual harassment cases, the Court should be asked to decide such issues only as a last resort.

Our equal employment opportunity laws and, in particular, title 7 of the Civil Rights Act of 1964 were designed to promote voluntary settlement of employment discrimination issues at the level of the employer and the employee.

It is at that level that sexual harassment discrimination can best be resolved as well.

We will all be well served by a process which encourages prompt resolution of these problems at the employer-employee level.

Thank you. And I'll be happy to try to respond to any questions you have about the *Vinson* case.

Mr. MARTINEZ. Thank you, Mr. Kessler.

[The prepared statement of Lorence L. Kessler follows:]

PREPARED STATEMENT OF LORENCE L. KESSLER, ATTORNEY, MCGUINESS & WILLIAMS LAW FIRM, WASHINGTON, DC

Mr. Chairman, and distinguished Members of the Subcommittee:

My name is Lorence Kessler, and I am a member of the law firm of McGuiness & Williams in Washington, D. C., specializing in employment and labor law. I appreciate the Subcommittee's invitation to appear at these hearings to discuss what employers are doing to prevent sexual harassment in the workplace.

In my practice, I work with a variety of mid-sized and large employers on equal opportunity matters. From this perspective, I have seen a strong commitment by these employers to assure that all employees understand, first, that sexual harassment is not condoned in the workplace, and second, that any employee who has been the victim of unwelcome sexual advances should let the employer know so that remedial action may be taken. This approach was begun in the belief, expressed by the Equal Employment Opportunity Commission in 1980, that "prevention is the best tool for the elimination of sexual harassment." 29 CFR 1604.11(f). Six years later, following the Supreme Court's first decision on the issue of sex harassment, this approach remains sound employment policy.

The Supreme Court's Decision

The recent decision by the Supreme Court, in Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (No. 84-1979, June 19, 1986), has served to focus public attention on sex harassment as an employment issue. From a legal standpoint, it also has served an important purpose in the maturing of this issue. The opinion of the Court written by Justice Rehnquist recognized that sex discrimination in the form of harassment is actionable under Title VII of the Civil Rights Act. Further, the opinion clarified that the key inquiry in any sex harassment claim is whether the alleged advances were "unwelcome." 106 S. Ct. at 2406. In addition, the Court wisely rejected the "automatic liability" standard which the court of appeals had improvised. 106 S. Ct. at 2408. In practical terms, employers can seek to prevent sexual harassment, but they cannot guarantee that unwanted sexual advances will never occur. Employers, however, can promise that, once they become aware of a sex harassment problem, they will act promptly and fairly to eliminate that problem.

While the Court declined to issue a definitive rule on employer liability for sex harassment claims based entirely on the "hostile environment" theory, the Court's opinion quotes extensively from the brief filed by the Equal Employment Opportunity Commission. The EEOC suggested that, when a sexual harassment claim rests exclusively on a "hostile environment" theory, the application of traditional principles of agency law leads to

> a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment ... .

Brief for EEOC, as quoted in Vinson, 106 S. Ct. at 2408. Thus, the Court noted that while absence of notice alone does not necessarily insulate the employer from liability, Title VII's definition of employer, by embodying agency law principles, does indicate that Congress intended to place some limits on the acts of employees for which an employer can be held liable under Title VII.

Employer Initiatives Against Sexual Harassment

The employers I work with generally have had policies and training programs designed to prevent sex harassment for a number of years. I do not think their situation is uncommon for the larger employers in the country. The increased attention which sexual harassment has been receiving lately has created an opportunity for these companies to reaffirm their policies. But, for most of these employers, the Vinson decision does not require any radical changes in the manner in which they have been dealing with problems of sex harassment. Today, the most successful formula for dealing with sexual harassment remains the same as it has been. That is, education -- education aimed at preventing harassment from becoming a problem in the first place. Such programs take many forms. For example:

- Training employees generally to increase their awareness on this issue;

- Training for supervisory employees to explain the company's policy prohibiting sexual harassment and how supervisors are to respond when an employee comes to them with a complaint of harassment;

- Training for supervisors in workplaces which traditionally have had very few female employees to increase supervisor awareness of the problems and attitudes that can confront women employees who are now entering those jobs; and

- Training employees, particularly women employees, on how to respond to unwelcome advances, should they occur.

In addition, most employers recognize that when sexual harassment does occur, effective internal complaint procedures can significantly increase the chance for prompt resolution of the problem. Employers have found that some, or all, of the following are useful elements to be included in an internal complaint procedure:

-- Complaints may be made through any of several people, not simply the supervisor, thus assuring that an alleged harasser is not the employee's only channel for registering a complaint;

-- Those designated to receive complaints (other than the supervisor) are individuals with whom the employee will feel comfortable discussing their problem and who have been trained in dealing with complaints of sexual harassment;

-- A telephone complaint line which can be used by employees who find it difficult to register their complaint in person; and

-- Procedures to assure the confidentiality of any complaints as well as any information developed during the employer's investigation.

In discussing what steps employers are taking in response to the Vinson decision, there is an additional item that needs to be addressed. I have read and heard concerns from some people outside of the employer community that the Supreme Court's decision might have the perverse impact of limiting opportunities for women because employers will be hesitant to hire women for certain jobs. I see no basis for such concerns. Since the Court's decision in June, I have had requests for advice from several dozen employers on the issue of sex harassment. Not once in any of those consultations has an employer suggested that the way to meet the problem of sex harassment would be to keep women out of certain jobs. Rather, the inquiries have focused on reviewing internal complaint procedures and developing training programs that will confront harassment directly.

Some Difficult Issues Remain

I am confident that employers will continue to make progress in sending the message that sex harassment is not tolerated in the workplace. On the other hand, this is not to say that the task of eliminating sex harassment will be an easy one.

For example, as the Supreme Court recognized in Vinson, the fact-finder in a sex harassment case is faced with a difficult chore. The question of whether particular conduct did occur and whether it was indeed unwelcome can present difficult problems of proof. In deciding such questions, the judge may look to any evidence which sheds light on the circumstances surrounding the alleged conduct. 106 S. Ct. at 2407. (And, as the EEOC Guidelines recognize, the trier of fact is to decide such questions by looking at the "totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR 1604.11(b)). But, ultimately such questions often must be decided on the basis of credibility determinations made by judge. 106 S. Ct. at 2406. As the diverse opinions from the lower courts in the Vinson litigation suggest, the issue often is a not-so-simple question of which witness is to be believed. These same difficulties which face judicial fact-finders also confront company officials as they conduct internal investigations of sex harassment claims. Claims often are reduced to the word of one person against the word of another.

Similar difficulties in learning the truth are presented when, in the absence of a formal complaint, company officials become aware of extra-curricular conduct between employees, especially where one of the employees is a supervisor. We all know that there is a legitimate difference between "welcome" amd "unwelcome" advances. But making that distinction may not always be easy for company officials who are "third parties" to the conduct. For example, while it is difficult to compile reliable statistics about such things, a survey by psychologist Srully Blotnick published last April indicated that even though some 20 percent of romantic relationships which begin in the workplace do result in marriage, workplace relationships overall have an average duration of 51 days. This suggests that what was once welcome can become unwelcome. If so, at what point does it become a concern of the employer? And, even if a relationship between a supervisor and a subordinate is entirely welcome to both individuals, does such a relationship have adverse consequences for the other subordinates in the office?

Clearly, the flagrant cases of sex harassment will not be the most difficult to deal with. The more subtle cases will require exceptional management skills as companies seek to carry out their obligations to eliminate known harassment while maintaining a corporate culture which avoids interference in the personal lives of employees.

Another serious issue concerns the rights of an employee who is alleged to have violated the company's prohibition on sexual harassment. Some attorneys have suggested that because of the potential impact which even mere allegations of harassment may have on an individual's career and home life, an individual charged with sex harassment may be able to bring a lawsuit for libel. Again, superior management skills will be required as companies seek to balance the need to conduct a full investigation of alleged harassment and the need to protect the legitimate rights of the person accused of the misconduct.

Prevention and Voluntary Resolution of Complaints Preferred

By raising these questions, I do not mean to suggest that companies will be unable to deal with most situations of sex harassment. Nor am I suggesting that Congress needs to act on these questions. The fact that many questions remain to be answered should not obscure the fact that existing law places a significant responsibility on employers to confront problems of sex harassment. The employers I have worked with take this responsibility very seriously. The educational efforts undertaken by these employers serve us all. And, in practical terms, the hope for eliminating sex harassment lies in the success of such programs rather than in additional litigation or legislation. The Vinson litigation itself is a poignant reminder that, while courts stand ready to rule in sex harassment cases, the courts should be asked to decide such issues only as a last resort. Regardless of how one may view the underlying allegations in the Vinson case, I doubt that anyone would suggest that eight years of litigation was the most desirable means to resolve those allegations.

Our equal employment opportunity laws -- particularly Title VII of the Civil Rights Act of 1964 -- were designed to promote voluntary resolution of employment discrimination issues, at the employer-employee level. It is at that level that sexual harassment discrimination can best be resolved as well. Our society will be well served by programs which seek to prevent sex harassment and to encourage prompt resolution of harassment problems at the employer-employee level.

Mr. **Martinez**. Right off the bat, from your perspective, probably the first question I have should be directed toward you.

And I have to couch this in very careful terms so I don't give the wrong impression.

But there is in the workplace, and always has been, and for lack of a better description—a game that people play, which sometimes brings in to it sexual favors or—given two ways, one done for the person with advancement power, and done, too, for the favor of advancing.

You can go into education all you want, but the other factor that you always have, when you have men and women interacting in an office, and sometimes very closely, is a natural attraction that happens sometimes between men and women.

How can you in training make sure that these people, if they have a personal involvement, that it be outside that professionalism that should exist there in that office?

How can you train people and educate people to that?

Mr. **Kessler**. I think—I think the essence of the training is in letting individuals know that if they're confronted with that situation and they don't want that situation, there is recourse. They can file a complaint; they don't have to give in just because it's a supervisor saying go along or you won't get promoted.

The other question about the things that happen when you put men and women in a workplace, if what happens is not unwelcome, I don't think it comes under the issue of sexual harassment.

But the essence of the education is that women, in particular, have to know that it's acceptable for them to say no or to make a complaint.

In other words, these situations shouldn't be allowed, employers don't want these situations to go on.

Mr. **Martinez**. Ms. Burns.

Ms. **Burns**. Thank you, Mr. Martinez.

I believe that the equal employment opportunity guidelines concerning sexual harassment, which appear at 29 CFR 1604.11, subsection G, does define a form of sexual harassment which concerns, I think, the circumstance to which you're pointing.

In the trade, in the title 7 litigation trade, it's known as third-party sexual harassment.

The concern in subsection G of the regulations is the harm that might accrue to other workers in the event that a supervisor and a subordinate employee would engage in wanted sexual liaison, the effect of which would be to effectively deny promotions, for example, or other job benefits, or opportunities to another worker in the workplace who would be otherwise qualified and deserving.

There have been a few cases before the EEOC on third-party sexual harassment.

I'm not, at this moment, at least in the front of my mind, aware of a case in Federal court on third-party sexual harassment. And I suppose, particularly given the position that the EEOC has begun to take on its own sexual harassment guidelines, we can't know, in the future, where the Government will go on that issue.

I think, however, given the very strong feelings that all workers have about the issue of women being defined as sexual objects in the workplace and the harm that does to employee morale, I'm sure that employers who are concerned about the problem are also concerned about this aspect of the problem, that, indeed, morale tends to drop very rapidly in a workplace where the perception is that one employee is being advanced not because of merit, but because they've engaged in a sexual liaison.

And I think perhaps Mr. Kessler was simply overlooking subsection G.

Mr. **Martinez**. Well, that's the point I was getting to exactly. And you've answered, really, the followup question. I would like Mr. Kessler to answer it, too.

You know, where it's welcome, maybe it's not a violation of the law. But it does complicate the problem because it's advancement that is nonmeritorious.

At some point in time, should there be a falling out, let's say, then it is even more complicated in that all of a sudden, then, it may become a charge of sexual harassment.

Mr. **Kessler**. I would agree absolutely. I think it's—well, some of the—I didn't read my entire statement.

Some of the problems that I mentioned in there have to do with how does an employer who is trying to maintain a corporate culture in which the employer tries to not get involved in people's personal lives, how does the employer decide when a welcome relationship has become something that is unwelcome.

Now, that's a potential sexual harassment problem.

And the other issue is very much a management problem, but I don't know that it's a sex harassment problem. That is, if people, under the employer's system, are being promoted because of sexual favors, not because of ability, that eventually hurts the employer. That's bad management to let that happen.

But I'm not saying that kind of a situation is endorsed in any way. I'm just saying that I think that's out there on the fringe.

And from what I have heard here, the statistics, we have a very serious problem. And I think the flagrant cases can be handled, the problem can be eliminated there.

But certainly there are some questions out on the fringe that need to be answered. And they're going to be difficult legal issues.

Mr. **Martinez**. From your testimony, I take it that you really don't feel that there's anything that Congress can do further to eliminate the issue of sexual harassment on the job or protect against it, but that it can be handled more in a management atmosphere or in a management way.

Mr. **Kessler**. That's very much my feeling. I think that's particularly true because we do have a Supreme Court decision that makes it very clear that this kind of conduct is not tolerated.

And up until now we have not had a Supreme Court decision. We have had other court decisions. But I think just the impact of a Supreme Court decision saying that sex harassment is discrimination and it's not tolerated is going to be good.

Mr. **Martinez**. Ms. Burns, I would like you to respond to that. And then follow up by telling us, is there another case that has been accepted by the Supreme Court.

Ms. **Burns**. With respect to the question of what Congress can do, Congress played a very, very important role in educating this country and in informing this country about sexual harassment. I think the watershed years were 1979, 1980, and 1981.

As I'm sure you're aware, the case law in this area governing sexual harassment has really only developed in the last 10 years.

And in the very early years, many of the district courts were reluctant to find that sexual harassment of the sort that we've been discussing today was, indeed, sex discrimination. And I think that was because the courts had an immediate impression that, because it was sexual in nature, the interactions were somehow personal.

It is because of the many studies and the extensive work. Many of those studies were funded by Congress. For example, the U.S. merit system's protection study was first endorsed and stimulated by congressional oversight. And then, of course, there were the hearings in Congress with respect to the proposed sexual harassment guidelines before the EEOC.

Those years in which those hearings were held were very, very important. And the money that Congress devoted to the study of sexual harassment in the Federal work force was really of the utmost importance.

We now know that sexual harassment is not a unique event and an interest of a personal nature, but, indeed, a sex-based, that is, a class-based harm against women.

I don't think it's necessary, at this point, for Congress to enact further legislation.

The *Meritor Savings Bank* case, the *Vinson* case, is a pretty good one from our standpoint.

We will see how the agency principles shake out. I'm fairly confident that we'll see stringent enforcement with respect to liability in that area. And, thus, I'm optimistic.

But I do think that the continued oversight and the pressure from Congress, both to continue to be informed about sexual harassment—because, as you know, there's this tendency to say, well, it was a problem 5 years ago, but, now, since we've recognized it, it's gone away. And it's not going away.

It, in fact, has been getting worse in the last several years we think because of the support for all kinds of backsliding in the area of antidiscrimination efforts in the workplace.

We certainly litigate a lot of cases against the Federal Government. And it's our feeling that things are getting worse, not better.

So, it is my hope that Congress will continue to press for enforcement and maintain the important oversight and support the studies that have been so important to our knowing what the problem is.

I must confess that I'm not aware of the case that you've mentioned, that I gather you're saying that a writ of cert was recently granted in a sexual harassment case.

That has escaped my notice. And I apologize to the committee. I can follow up on it, and, if you have a particular question about it, see that an answer is included in the record.

Mr. MARTINEZ. All right.

At this point in time, if there's no objection, I would keep the record open so that Mr. Gunderson, who joined us briefly for a minute, would be able to ask questions through the mail and be responded to.

If there is no objection, that will be so ordered.

What are the general issues that we have to be alerted for now and watchful for now as we go forward?

Ms. **Burns**. I think that one of the most important areas that we have to be watchful is the notion that somehow this is an individual problem. It does seem to stick in some people's minds still that it is an individual problem.

And I think that we'll see that issue playing out in the courts in a funny way, in the way that—particularly as we've—as President Reagan has appointed more and more members to judges to the U.S. district court and court of appeals levels, I think there's a tendency to be cutting back on procedural safeguards for litigants on title 7 cases, particularly in the area of class action and in the area, for example, of attorneys' fees.

I'm sure that many employers recognize the real extent of the harm of sexual harassment to their own productivity, but many employers do not. And I think that it is, in fact, the threat of litigation that keeps them alert to the problem and might motivate them to action when there would otherwise be inaction.

But I think that we need to be concerned that there not be an erosion of the rights of women who suffer from sexual harassment in this sort of indirect procedural way.

And I would hope that Congress would remain alert that that's the way, in fact, that this administration has sought to undermine the rights of women and minority workers by attacking at the procedural rights level, and that we're seeing many fewer class actions being granted in these courts now. And I think that we will continue to see that to be a problem.

There's also a continuing cutting back on attorneys' fees. And without attorneys' fees, you're not going to have that market of people. It's sort of like cutting back funding to legal services. You will not see that market of attorneys out there willing to go out and fight the fight, because there will simply be no money, not the very limited funds that there are now under title 7.

So, I would caution that we may see an erosion not in the actual definition of a right, but in the opportunities in the procedural ways that we can redress the wrongs that have occurred.

Mr. **Martinez**. Very good. Thank you.

Mr. Hayes.

Mr. **Hayes**. Thank you, Mr. Chairman. Just one question.

I'm trying to—Mr. Kessler, do you share the opinions just advanced by Ms. Burns in regard to the track record of the administration?

Mr. **Kessler**. I'm—as it relates to sex harassment——

Mr. **Hayes**. That's what I'm talking about.

Mr. **Kessler**. I'm not aware that when cases are filed there is any less attention given to those cases.

I just can't. I can't respond to that. I'm not——

Mr. **Hayes**. You seem to, in your statement, your testimony, place emphasis on the education rather than affirmative action and the court's role for avenues for solution.

Did I understand you wrong?

Mr. **Kessler**. I didn't say—I said education. I think education is important. And I think that's what the EEOC said in their guidelines, that the way to get at this problem is to prevent it in the first place.

I didn't say that education as opposed to affirmative action.

I think that to the extent that by affirmative action more women are coming into workplaces where they haven't been in the past, more women are moving into supervisory positions, I think the problem as it relates to workplaces being something that are unkind to women or not understanding to women, some of that is going to change certainly.

That's not going to alleviate the problem. But in answer to your question, I don't put education and affirmative action as mutually exclusive alternatives.

Mr. **Hayes**. Should enforcement of affirmative action under the civil rights statutes—could lead to the eradication or elimination of this harassment, sex harassment, that goes on, don't you think, at the workplace?

Mr. **Kessler**. I think it's going to change as more people come into the workplace, as workplaces that were exclusively female become integrated, and workplaces that were exclusively male become integrated.

It would seem to me it's going to alleviate the culture that may have existed in some workplaces that harassed people because of their sex.

Mr. **Hayes**. The mechanism of maintaining employment, which has been used against women, in exchange for sexual favors, you think that should be eliminated, don't you?

Mr. **Kessler**. I think that's bad management.

Mr. **Hayes**. Bad management? Some managers do it.

Mr. **Kessler**. Well, but their managers, their bosses don't think it's good management I can assure you.

Mr. **Hayes**. All right.

Mr. **Martinez**. Thank you, Mr. Hayes.

I think you're right about education and affirmative action coupled together. It will have to be the answer.

One of the things that's got to change is attitudes of people in the work force where there have not been women before.

I almost feel that sometimes some of what's done is to try to discourage those women from working there, which is bad.

I think strong statements from employers that they're not going to tolerate that, that these women are being hired to do a job the same as they are. They're going to be here, and they're going to be a part of this work force, and any kind of harassment is not going to be tolerated by the employer, even to the point that, hey, it may mean for you immediate termination of your employment, I think that goes a long way of sending a message.

I thank you very much for your testimony, both of you. You've helped us and your service has been invaluable. Thank you.

Mr. **Kessler**. Thank you.

Ms. **Burns**. Thank you.

Mr. **Martinez**. We're adjourned.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

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